(1)

Supreme Court, U.S.
FILED

No. 02 1710 MAY 19 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

MARK G. WEINBERG,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
MYRIAM ZRECZNY
Senior Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

Attorneys for Petitioners

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

91 pp

QUESTION PRESENTED

Whether a geographically targeted peddling restriction in an area of special congestion is a reasonable regulation of the time, place, and manner for disseminating written materials.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	22
APPENDICES	1a

TABLE OF AUTHORITIES

CASES — Page

Alexander v. United States, 509 U.S. 544 (1993).. 10
Arcara v. Cloud Books, 478 U.S. 697 (1986)..... 9-10
Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990)..... 20
Burson v. Freeman, 504 U.S. 191 (1992)..... 12
City of Ladue v. Gilleo, 512 U.S. 43 (1994)..... 20
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)..... 9, 10
Cohen v. California, 403 U.S. 15 (1971)..... 10
Friends of the Vietnam Veterans Memorial v. Kennedy, 116 F.3d 495 (D.C. Cir. 1997), cert. denied, 522 U.S. 1108 (1998)..... 6, 7, 14, 16-17, 20
Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (en banc), cert. denied, 511 U.S. 1085 (1994)..... 14
Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).....7, 8, 9, 18
Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002).....6, 7, 16, 20
Hill v. Colorado, 530 U.S. 703 (2000)..... 16, 18
Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995)..... 10
International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997)..... 12
International Society for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79 (Minn. 1980), rev'd, 452 U.S. 640 (1981)..... 8-9
ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949 (D.C. Cir. 1995).....6, 7, 14
Members of the City Council v. Taxpayers For Vincent, 466 U.S. 789 (1984)..... 9, 17

TABLE OF AUTHORITIES—Continued

	Page
One World One Family Now v. City & County of Honolulu, 76 F.3d 1009 (9th Cir.), cert. denied, 519 U.S. 1009 (1996)	*passim*
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)	18
United States v. Grace, 461 U.S. 171 (1983)	7
United States v. Kokinda, 497 U.S. 720 (1990)	11
United States v. O'Brien, 391 U.S. 367 (1968)	10
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	9, 13, 16
Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002)	13-14

CONSTITUTIONAL PROVISION

U.S. Const. Amend. I	2

STATUTES AND ORDINANCES

28 U.S.C. § 1254(1) (2000)	2
Municipal Code of Chicago, Ill. § 4-244-010 (1999)	2-3
Municipal Code of Chicago, Ill. § 4-244-147 (1999)	2, 3
Municipal Code of Chicago, Ill. § 10-8-520 (1999)	3

MISCELLANEOUS

Chicago City Council, *Journal of Proceedings* at 105167-68 (March 5, 2003)	5

IN THE

Supreme Court of the United States

No. ___

CITY OF CHICAGO,

Petitioner,

v.

MARK G. WEINBERG,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra* at 1a-25a) is reported at 310 F.3d 1029 (7th Cir. 2002). The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing en banc of the City of Chicago and the dissenting opinion therefrom (App., *infra* at 26a-34a) are reported at 320 F.3d 682 (7th Cir. 2003). The opinion of the district court (App., *infra* at 35a-62a) is reported at 179 F. Supp. 2d 869 (N.D. Ill. 2002).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 20, 2002. A timely petition for rehearing was denied on February 19, 2003. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution, U.S. Const. Amend. I, provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Municipal Code of Chicago, Ill. § 4-244-147 (1999), provides:

> **Peddling in vicinity of United Center.**
>
> No person shall peddle merchandise of any type on any portion of the public way within 1,000 feet of the United Center. A person holding a valid peddler's license may peddle merchandise while on private property within 1,000 feet of the United Center only from a cart, table or temporary stand on private property without obstructing the public way, and pursuant to prior written permission from the property owner to do so. The provisions of this section shall be in addition to any other limitation on or regulation of peddlers. Any person who violates any provision of this section shall be fined not less than $200.00 nor more than $500.00 for each offense, and each day such violation shall continue shall be deemed a distinct and separate offense.

The Municipal Code of Chicago, Ill. § 4-244-010 (1999), provides:

> **Peddler defined.**
>
> As used in this chapter:
>
> "Peddler" means any individual who, going from place to place, shall sell, offer for sale, sell and deliver,

barter or exchange any goods, wares, merchandise, wood, fruits, vegetables or produce from a vehicle or otherwise. The word "peddler" does not include a grower or producer as defined in Section 4-12-010 of this Code.

STATEMENT

Chicago's United Center is a large stadium that is home to the Chicago Blackhawks, the Chicago Bulls, and other major events. It is located in a high-density residential area and events at the United Center typically attract crowds of 20,000 or more. App., *infra* at 27a. Prior to the enactment of the ordinance at issue in this case in 1995, peddlers hawking wares created serious traffic congestion and safety concerns on the public sidewalks surrounding the stadium. *Id.* at 27a-28a, 45a-46a, 47a, 50a. Congestion "becomes acute when crowds . . . converge at game time." *Id.* at 27a. To address these concerns, the Chicago City Council enacted a ban on peddling on the public way within 1,000 feet of the United Center. *Id.* at 2a-3a; Municipal Code of Chicago, Ill. § 4-244-147 (1999). The ban applies to the sale of all merchandise of any kind; only newspapers are exempted. App., *infra* at 2a-3a.[1] Similar restrictions were enacted around other large stadia throughout Chicago. *Id.* at 3a. According to police, the peddling ban has proven remarkably effective in alleviating these traffic and safety concerns as thousands of people enter or leave the United Center, resulting in more orderly traffic flow and requiring deployment of fewer police officers. *Id.* at 27a-28a, 46a-47a.

Respondent Mark Weinberg ("Weinberg") is the author of *Career Misconduct: The Story of Bill Wirtz's Greed, Corruption, and the Betrayal of Blackhawk Fans*, a book highly

---

[1] The Municipal Code exempts newspapers from all regulations governing peddling on the public ways. See Municipal Code of Chicago, Ill. § 10-8-520 (1999).

critical of Chicago Blackhawks owner Bill Wirtz. App., *infra* at 2a. In December 2000, Weinberg began selling his book on the sidewalks outside the United Center. *Id.* at 35a-36a. Weinberg sold the book for two months, until Chicago police officers informed him that the United Center peddling ordinance prohibited the sale of the book within 1,000 feet of the United Center. *Id.* at 2a. Weinberg filed suit, claiming that the peddling ban was an unconstitutional restriction on free speech. *Id.* at 36a, 38a-39a.

The district court granted Weinberg preliminary injunctive relief, App., *infra* at 36a, but on the parties' cross-motions for summary judgment determined that the peddling restriction did not violate the First Amendment, and entered judgment for Chicago, *id.* at 3a, 40a-52a, 62a. The court of appeals reversed, holding that the ordinance violated the First Amendment. The court held that the peddling restriction was content neutral, but that Chicago had failed to adequately demonstrate that the ordinance advanced a legitimate governmental interest. *Id.* at 10a-13a. Although the court did not doubt Chicago's "legitimate interest in protecting its citizens and ensuring that its streets and sidewalks are safe for everyone," *id.* at 10a, it concluded that the City's concerns were speculative, at least as to Weinberg and other booksellers, *id.* at 11a-12a. In particular, the court found that when Weinberg sold his book outside the United Center, "there was no interference with pedestrian traffic nor any congestion along the sidewalk." *Id.* at 11a. The court further held that excluding leafleting, newspaper sales, street performances, and charitable solicitations was inconsistent with the City's interest in alleviating traffic congestion. *Id.* at 13a.

The court also determined that the peddling restriction was not narrowly tailored to advance Chicago's interest in regulating its streets and sidewalks because its 1,000 foot ban was too large, App., *infra* at 14a-16a, and failed to achieve a

"middle ground," *id.* at 15a. The ban, the court held, "effectively eliminates any opportunity for Mr. Weinberg to sell his book to patrons of the United Center." *Id.*

Finally, the court of appeals held that the ordinance did not leave open adequate alternative channels of communication to Weinberg. App., *infra* at 15a-17a. While acknowledging that Weinberg had alternative means to advertise and sell his book, and that Weinberg still had the ability to disseminate his message in other ways outside the United Center, *id.* at 16a, the court held that Weinberg's message was burdened because he had chosen to express himself in a book, and "[t]he most opportune time and place to reach [his] audience is outside the United Center, before and after Blackhawks home games," *id.* at 17a. The court thus concluded that the ordinance violated the First Amendment because it was not a reasonable time, place, and manner restriction on speech. *Id.* at 18a.[2]

The City's petition for rehearing en banc was denied, but Judges Easterbrook, Coffey, Manion, and Ripple, voted to grant rehearing. App., *infra* at 26a. In a dissenting opinion joined by Judges Coffey and Manion, Judge Easterbrook observed that the Seventh Circuit's opinion in this case conflicts with the decisions of other circuits and of this Court that have upheld nearly identical peddling restrictions, and

---

[2] The court of appeals also sustained Weinberg's facial challenge to Chicago's licensing procedure under the peddling ordinance, on the ground that it was an unlawful prior restraint because it gave Chicago "unbridled discretion" in licensing that "may result in censorship." App., *infra* at 25a. We do not seek review of this issue because it is immaterial to the outcome of the case. If the ordinance banning peddling within 1,000 feet of the United Center is valid, it bars Weinberg's peddling whether or not the licensing procedure is valid. In any event, the licensing procedure was amended by the Chicago City Council on March 5, 2003 to eliminate the impermissible licensing discretion that the Seventh Circuit perceived in the prior ordinance. See Chicago City Council, *Journal of Proceedings* at 105167-68 (March 5, 2003).

that the case presents an important and recurring issue "as people seek to put public spaces to private ends." *Id.* at 27a. In particular, Judge Easterbrook observed that the Ninth and D.C. Circuits have determined, contrary to the decision of the Seventh Circuit, that "the government need not allow the sale of expressive materials in public parks where selling souvenirs and other trinkets has been forbidden." *Id.* at 30a (citing *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002); *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997); *One World One Family Now v. Honolulu*, 76 F.3d 1009 (9th Cir.), cert. denied, 519 U.S. 1009 (1996); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995)). Judge Easterbrook noted that the panel had reached its holding "without trying to reconcile its view with contrary decisions of the Supreme Court," and did not "recognize that it was going into conflict with other circuits that have rejected materially similar arguments." App., *infra* at 27a.

Judge Easterbrook further observed that in light of the opinion in this case, it will be impossible to prohibit anything that amounts to "speech" under the First Amendment outside of a stadium, which will dramatically undermine local governments' ability to keep order outside stadia and similar venues. He explained that since "*everything* offered for sale at a sports stadium includes some commercial speech, everything may be sold there under the panel's opinion -- including bags of pretzels bearing horoscopes and hot dogs served in paper trays emblazoned in slogans . . . ." App., *infra* at 32a-33a (emphasis in original).

REASONS FOR GRANTING THE PETITION

At a time when securing the public safety is of heightened concern, the decision below has parted with the holdings of other circuits and decisions of this Court to strip local governments of an essential tool in maintaining public order at crowded venues. The City's peddling ban in areas in

proximity to a major sports and entertainment venue is a reasonable regulation of the time, place, and manner of speech.

This Court has long settled the test for reasonable time, place, and manner restrictions on speech: they must be content neutral, narrowly tailored to advance a significant governmental interest, and leave alternative channels of communication open. See, *e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983). While the court below correctly acknowledged the ordinance's content neutrality, its holdings on every other aspect of the time, place, and manner test are in irreconcilable conflict with decisions of this Court and the Ninth and D.C. Circuits. The Seventh Circuit's decision to invalidate the ordinance because it found that there was no evidence that Weinberg in particular or booksellers in general had previously caused undue congestion at the United Center, for example, is in conflict with this Court's decision in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). In that case, the Court, as it upheld a prohibition on the sale or distribution of merchandise at a state fair from any location other than an authorized booth, explained that this regulation must be judged not by the congestion that an exception for the plaintiff alone would create, but instead by reference to the congestion that an exception for all who might seek to engage in expressive activities would create. See *id.* at 651-55. Using this approach, the District of Columbia Circuit has repeatedly upheld a peddling ban on the National Mall even as applied to message-bearing merchandise. See *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002); *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995). And the Ninth Circuit has upheld an ordinance prohibiting the sale of merchandise, including books, on the streets of Waikiki. See *One World One Family*

Now v. City & County of Honolulu, 76 F.3d 1009 (9th Cir.), cert. denied, 519 U.S. 1009 (1996). But as the dissent from the denial of rehearing noted, the court below did not even attempt to square its holding with the case law upholding targeted peddling restrictions.

Review is all the more necessary because of the practical consequence of the court of appeals' decision. Unfortunately, our world now requires governments at all levels to be increasingly vigilant toward policing, especially in large public venues and crowds, but the holding below effectively eliminates the ability of Chicago and other cities to take appropriate measures to ensure the public safety in areas of intense congestion. As Judge Easterbrook observed, the decision below effectively eliminates the ability of municipalities to address the problems posed by peddling in areas of special congestion; no ordinance could pass the demanding test imposed by the Seventh Circuit here. See App., *infra* at 31a-33a. The decision below unduly limits the police power and throws previously settled law into disarray. Plenary review, if not summary reversal, is therefore warranted.

1. The court of appeals departed from decisions of this Court and of other circuits when it concluded that Chicago had failed to adequately demonstrate that the peddling restriction served the significant government interest of reducing traffic congestion and ensuring pedestrian safety.

a. In reaching this conclusion, the court of appeals held, in terms, that a plaintiff's activities alone must justify the restriction on speech. App., *infra* at 12a (identifying lack of "objective evidence that traffic flow . . . is disrupted when Mr. Weinberg sells his book," and that "there was no evidence that other booksellers were present around the United Center"). This approach is precisely what this Court rejected in *Heffron*.

In that case, the Minnesota Supreme Court overturned a prohibition on solicitation and distribution of literature at a

state fair because it concluded that no disruption would be caused by granting the plaintiffs an exemption. See *International Society for Krishna Consciousness, Inc. v. Heffron*, 299 N.W.2d 79, 84 (Minn. 1980) ("We are not convinced that allowing ISKCON members to also distribute religious literature and accept money throughout the public areas of the fairgrounds would cause additional disruption sufficient to justify confining those activities to a booth."), rev'd, 452 U.S. 640 (1981). But as this Court explained in reversing that holding, if ISKCON were allowed an exemption from a solicitation prohibition, other religious, social, political, charitable, and even commercial groups would have an equal claim to exemption: "any such exemption cannot be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd." *Heffron*, 452 U.S. at 654. Thus, the regulation was justified as an effort to limit congestion caused not only by ISKCON, but by other "social, political, or charitable organizations" and even "commercial organizations" that would result if they "could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will." *Id.* at 653. Accordingly, and contrary to the view of the court of appeals in this case, "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). Accord, *e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984); *Members of the City Council v. Taxpayers For Vincent*, 466 U.S. 789, 815-16 (1984). It is equally settled that when the government regulates commercial activity, it is not obligated to grant exemptions to those who sell books or who otherwise engage in activities protected by the First Amendment. As this Court explained in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), "neither the

press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Id.* at 705. See also, *e.g.*, *Alexander v. United States*, 509 U.S. 544, 554-58 (1993); *Community For Creative Non-Violence*, 468 U.S. at 294-99; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

In his dissent from the denial of rehearing, Judge Easterbrook made just this point. "[T]he question on the table is the degree of congestion to be expected from the law's repeal; it is not limited to the hassles Weinberg will cause all by himself." App., *infra* at 33a. And in this case it is uncontested that the problem posed by peddling at the United Center prior to the enactment of the law at issue was substantial. Moreover, the universe of those who can claim an entitlement under the First Amendment to sell their wares is not limited to Weinberg. After all, booksellers have no unique claim to First Amendment protection; any message-bearing commodity is equally entitled to First Amendment protection. See, *e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (message-bearing jacket). In turn, because "a narrow, succinctly articulable message is not a condition of constitutional protection," *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (citation omitted), those who sell an enormous array of merchandise—anything containing some kind of symbolic expression—can claim a First Amendment right to sell their wares near the United Center equal to Weinberg's. It is the threat of enormous congestion caused by that entire array and volume of sales that justifies this law, and not merely the congestion that Weinberg or even other booksellers alone would create.

Now that the Seventh Circuit has invalidated this ordinance, there is every reason to believe that the problems that led Chicago to enact the ordinance in 1995 will recur at the United Center and elsewhere. As Judge Easterbrook

observed, the Seventh Circuit's holding will protect not only booksellers, but also "*anyone*" who "may sell *any* expressive material (including T-shirts and 'expressive souvenirs such as team pennants')," App., *infra* at 32a (emphasis in original). These peddlers are now free to descend on the crowds outside the United Center and "other sports venues—not only in Chicago but throughout the circuit." App., *infra* at 33a. And when these problems reemerge, now, under the Seventh Circuit's holding in this case, local governments will be unable to solve them.

b. As important and devastating as this holding is, the means by which the court of appeals reached this result is just as important and just as flawed. First, the court of appeals expressed concern about what it characterized as Chicago's failure to support the ordinance with empirical studies, police records, statistics, or other "objective evidence," referring to Chicago's justification as speculative. App., *infra* 11a-12a. According to the court, the testimony from police officers working the United Center beat was "arguably self-serving." *Id.* at 11a. But local governments have never before been required, in cases of this type, asserting interests as basic as those asserted here, to produce the type of evidence the court of appeals demanded.

As this Court made clear in upholding a Postal Service ban on soliciting on Post Office property, a governmental body may rely on its own "real-world experience" as a basis for enacting regulations aimed at addressing problems it has encountered. *United States v. Kokinda*, 497 U.S. 720, 735 (1990) (plurality opinion). See also *id.* at 739 (Kennedy, J., concurring in the judgment) ("Given the Postal Service's past experience with expressive activity on its property, I cannot reject its judgment that in-person solicitation deserves different treatment from alternative forms of solicitation and expression."). More precise data or analysis is simply not needed. Indeed, the evidentiary burden imposed by the decision below cannot be reconciled with the approach of

other circuits, which have recognized this precise point with regard to traffic congestion on streets and sidewalks. See *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1551 (11th Cir. 1997) ("To demonstrate the significance of its interest, the City is not required to present detailed evidence of pedestrian or traffic flow on or around specific sidewalks; the City is entitled to advance its interests by arguments based on appeals to common sense and logic.") (internal quotations and citation omitted); *One World*, 76 F.3d at 1015 ("Cities need not prove up their interests on a block-by-block basis, particularly where the interests are as basic and traditional as Honolulu's [efforts to relieve traffic and congestion]."). This Court has not even required this sort of detailed evidence in First Amendment cases that apply the heightened strict scrutiny standard. See, *e.g.*, *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) ("history, a substantial consensus, and simple common sense" showed that geographical restriction on campaigning near polling places was necessary to protect right to vote free from intimidation and fraud).

Chicago's ordinance was motivated by the actual first-hand experience of police and security personnel in dealing with traffic and congestion around the United Center prior to enactment of the ordinance—including evidence of Weinberg's own disruption. App., *infra* at 28a & n.2, 45a-46a, 47a. This evidence was undisputed, as Judge Easterbrook pointed out. App., *infra* at 28a. See *id.* at 50a.[3] Prior to the

---

[3] The court of appeals found it significant that a court-ordered videotape taken near the United Center did not show Weinberg being disruptive. App., *infra* at 11a. The fact that a single bookseller did not disrupt traffic flow—especially when he knew he was being filmed for purposes of litigation—does not mean that this ordinance accomplishes nothing, especially when the reason he was the only peddler at the United Center was precisely because all other peddlers were obeying the ordinance. App., *infra* at 33a. As Judge Easterbrook observed, "[w]hat the tape principally demonstrates is that enforcement of the ordinance

ordinance's enactment, Chicago police faced serious difficulties managing congestion as they endeavored to safely file more than 20,000 people in and out of the arena. App., *infra* at 45a-46a, 47a, 50a. After enactment of the ordinance, they did not. *Id.* at 27a-28a, 46a-47a. This is evidence that problems caused by peddling are real, not conjectural. The question what type and quantum of "evidence" is necessary to support a time, place, and manner restriction is plainly of utmost importance. Indeed, it can arise in every one of these cases, and, at least on the view of the court below, was of dispositive significance.

c. The court of appeals also believed that the exception for leafleting, newspaper sales, street performances, and soliciting around the sports arena undermined Chicago's asserted interest in regulating congestion. App., *infra* at 13a. It is peculiar, to say the least, that the court of appeals found the ordinance unconstitutional because it did not prohibit enough speech. Even worse, the court of appeals' view that Chicago's regulation of some forms of expression but not others could not advance its interest in alleviating congestion represents yet another sharp departure from this Court's precedent, as well as decisions of other circuits holding that the government need not prohibit all activities that may create congestion in order to enforce a ban on some. This Court has made plain that to pass constitutional muster, a regulation on speech need not eliminate the problem it targets; it is enough that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation marks and citation omitted).[4] Other circuits have faithfully followed

---

facilitates smooth traffic flow. Evidence that a statute works should not be confused with a demonstration that it serves no useful purpose." *Ibid.*

[4] The court of appeals cited *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), to support the view that Chicago's approach cannot advance its stated interests. App., *infra* at 13a.

this Court's dictates in other peddling cases. In *One World*, for example, the Ninth Circuit upheld a prohibition on peddling even though vendors remained free to hand out promotional materials. See 76 F.3d at 1014 & n.9. Likewise, in *ISKCON of Potomac*, the court upheld a peddling ban despite an exemption for books and bumper stickers since the prohibition itself substantially reduced clutter on the National Mall. See 61 F.3d at 956-58. See also *Vietnam Veterans Memorial*, 116 F.3d at 496-97. Here, the undisputed evidence showed that targeting peddling alone had substantially reduced congestion and traffic around the arena. App., *infra* at 11a, 27a-28a, 46a-47a.[5] Moreover, rather than ban all activity, Chicago has targeted its restriction toward precisely the problem it sought to cure, thereby minimizing its impact on First Amendment activity. If anything, that should support the ordinance's constitutionality, not undermine it.

In *Watchtower*, this Court determined that an ordinance requiring door-to-door solicitors to obtain a permit did not further the municipality's interest in protecting residents' privacy and preventing crime because the annoyance caused by an uninvited knock on the door is the same whether or not the visitor has a permit, and criminals would not bother to obtain one. See 536 U.S. at 166-69. If Chicago permitted peddling within 1,000 feet of the United Center with a permit, *Watchtower* would apply here, since the permit requirement would not prevent peddling from causing congestion. Chicago's ordinance, however, bans all peddling within 1,000 feet of the United Center, as the court of appeals acknowledged. App., *infra* at 2a-3a, 5a-6a, 20a-21a.

[5] Because bookselling involves more browsing than quick transactions such as newspaper sales, leafleting, or charitable solicitation, it is more likely to obstruct pedestrian passage. On just that theory, the Seventh Circuit has upheld Chicago's ban on the sale of books at newspaper stands. See *Graff v. City of Chicago*, 9 F.3d 1309, 1320-21 (7th Cir. 1993) (en banc) (plurality opinion), cert. denied, 511 U.S. 1085 (1994); *id.* at 1333 (Flaum, J., concurring); *id.* at 1335 (Ripple, J., concurring). See also App., *infra* at 6a-7a.

d. The practical significance of the court of appeals' holding that the City had failed to properly demonstrate its stated governmental interest is immense. So long as the first peddler who seeks to violate a geographically targeted restriction behaves himself and causes no disruption, the peddling restriction will fall, and hundreds more peddlers can then join the first. Moreover, under the decision below, undisputed first-hand accounts that a peddling restriction has dramatically reduced congestion are insufficient to show that the restriction serves a legitimate governmental interest; rather, the government must conduct empirical studies or produce other "objective evidence." And finally, the decision of the court of appeals suggests that a local government is better off restricting more speech than precisely targeting its restriction to combat a specific problem. No other circuit follows this approach, which makes virtually every targeted peddling restriction subject to challenge and ready invalidation.

2. The court of appeals' determination that the ordinance was not narrowly tailored because its 1,000 foot ban covered too large a geographical area, App., *infra* at 14a-15a, likewise conflicts with decisions of this Court and those of other circuits. The court of appeals found that Chicago's concerns behind enactment of the ordinance did not justify the restriction, which covered "large parking lots, less congested walkways, or sidewalks in less proximity to the United Center." *Id.* at 14a. The court described the ordinance as an "all or nothing approach" that "avoids finding any kind of middle ground, such as a ban of less distance, a ban on peddling on certain narrow walkways, or a ban on peddling on the sidewalks immediately surrounding the United Center." *Id.* at 15a.

Any boundary of a no-peddling zone can be invalidated under this flawed approach. Whatever regulated area is chosen, it is always an "all or nothing" ban—all peddling is

banned within the restricted zone and not elsewhere. Moreover, it is rarely possible to prove that no other boundary could have been used. That is why this Court has concluded that a narrowly tailored regulation "need not be the least restrictive or least intrusive means." *Ward*, 491 U.S. at 798. The opinion below is in irreconcilable conflict with this Court's cases, and those of at least two circuits that have directly considered other peddling ordinances. In *Hill v. Colorado*, 530 U.S. 703 (2000), for example, this Court upheld a geographically targeted restriction on solicitation near health care facilities, making just this point. See *id.* at 726. And on this same basis, the Ninth and D.C. Circuits have held that a municipality need not prove that every area within a no-peddling zone is congested; a general showing that the area as a whole suffers from congestion will do. See, *e.g.*, *Vietnam Veterans Memorial*, 116 F.3d at 498; *One World*, 76 F.3d at 1014. As the Ninth Circuit has observed, "[c]ities need not prove up their interests on a block-by-block basis, particularly where the interests asserted are as basic and traditional as Honolulu's," 76 F.3d at 1015, including the promotion of public safety and the "orderly movement of pedestrians," *id.* at 1012. Indeed, the court explained, "these types of interests can be presumed to operate throughout a city, absent a strong showing to the contrary." *Id.* at 1015.

In any event, Chicago's ordinance does not represent an "all-or-nothing" approach; the 1,000 foot area is certainly smaller than the National Mall's peddling ban upheld in *Henderson* and *Vietnam Veterans Memorial*, see 253 F.3d at 16-17; 116 F.3d at 497-98, or the 500-acre peddling ban covering all "public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki" upheld in *One World*, see 76 F.3d at 1011 n.2, 1013-14.[6] Nor was the no-

[6] As Judge Easterbrook observed, notwithstanding that the restrictions in Washington, D.C. and Waikiki were far broader than Chicago's, the court of appeals attempted to distinguish *One World* and *Vietnam*

peddling zone chosen arbitrarily. It was specifically designed to coincide with the area in which "automobile and pedestrian traffic is most heavily concentrated." App., *infra* at 49a. It defies explanation how an ordinance that reaches the entirety of a problem is invalid for that reason. And, importantly, even within the 1,000 foot area, the ordinance's prohibition is not absolute; it exempts newspaper sales, leafleting, and other activities because they do not present the problems arising from peddling other merchandise. See App., *infra* at 6a-7a, 47a, 49a-50a. Chicago's ordinance targets precisely the activity that has caused problems, without sweeping in expressive activity that has not been shown to cause problems. Thus, Chicago "did no more than eliminate the exact source of the evil it sought to remedy," *Taxpayers for Vincent*, 466 U.S. at 808, and the ordinance was therefore appropriately tailored.

On a practical level, the court of appeals' view that time, place, and manner restrictions may not be applied to the entire area in which the expressive activity causes the secondary impact the government seeks to regulate is nothing short of perverse, and obviously makes it impossible to impose any such restriction that will be fully effective. And since the court provided no guidance for how no-peddling zones can be drawn, no regulation can be enacted in this area with confidence that it will be upheld. The Seventh Circuit's decision thus throws the law into disarray, and exposes local governments to huge damages judgments if they guess wrong as they define the boundaries of no-peddling zones.

3. Perhaps the most egregious of the court of appeals' errors lies in its holding that the ordinance fails to leave open

---

Veterans Memorial on the basis that "the magnitude of the no-peddling zone eliminates the possibility that Weinberg could sell his book in proximity to the prohibited area, making reliance on these cases suspect." App., *infra* at 16a n.3, 31a.

ample alternative channels of communication. This conclusion was based on the court's view that Weinberg's "intended audience is Chicago Blackhawks fans," and that "[t]he most opportune time" for Weinberg to reach his intended audience is outside the United Center, before and after Blackhawks home games. App., *infra* at 17a. See *id.* at 16a-18a.

These views reveal the court's novel, and flawed, approach that a peddler has the right to sell a product aimed at a particular audience wherever this targeted audience may gather—an approach that makes a mockery of the concept of ample alternatives. To begin with, this approach requires precisely the type of content-based inquiry in the character of a speaker's message that the First Amendment ordinarily forbids. See, *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Moreover, under this approach, any peddler wishing to sell programs, jerseys, videos, memorabilia, or any other products aimed at sports fans will be able to invalidate a peddling ban outside of a sports stadium. Anyone wishing to target their sale of Rolling Stones merchandise to fans attending a Stones concert will be able to invalidate a peddling ban as well. The same is true for any other location where large crowds may gather. Any peddler—from those wishing to sell music in public parks where audiences are gathered to hear an outdoor concert to those wishing to sell a book on politics where people gather in a public plaza for a political speech—can use the decision of the court of appeals to reach his ideal intended audience. Yet these are precisely the times and places where restrictions on peddling are most needed. And the First Amendment, moreover, simply does not require that individuals be permitted to deliver their messages in the best or most ideal location. Geographically based restrictions may not be invalidated merely because they make it somewhat harder for an individual to reach his intended audience, as this Court has made clear. See, *e.g.*, *Hill*, 530 U.S. at 707, 726-28; *Heffron*, 452 U.S. at 654-55.

In fact, the Ninth Circuit has recognized this principle in peddling cases. In *One World*, the plaintiffs claimed that Waikiki's ban on peddling on the public way prevented them from reaching their "intended audience," Waikiki tourists. 76 F.3d at 1014. Waikiki's ban was much broader than Chicago's, and included streets, alleys, sidewalks, malls, parks, beaches, and other public places in Waikiki. See *id.* at 1011. The court rejected the plaintiffs' claim, observing that although the plaintiffs could not sell their T-shirts to tourists on the public ways of Waikiki, they could give them away for free, distribute literature, solicit donations, wear the message-bearing T-shirts in the crowds of tourists, sell the T-shirts in local stores, or open their own stores. See *id.* at 1014-15. The court, moreover, rejected the district court's view that a "'total ban on selling expressive T-shirts in a heavily trafficked section of town'" was impermissible, concluding that "we have held broad and narrow bans in even the most desirable locations to the same standard." *Id.* at 1014 (citation omitted). Thus, in conflict with the decision below, the Ninth Circuit has made clear that a peddling ban in an area particularly attractive to peddlers is not unreasonable where the peddler has alternative means to disseminate his message to his intended audience.

And Chicago's ordinance does permit a number of options for peddlers to reach audiences gathering for events at the arena. Even Weinberg himself, as Judge Easterbrook noted, within the 1,000-foot zone, "may give away his book, button-hole passers-by and ply them with broadsides, or deliver a harangue from a soapbox. He may sell the book from any private property in the zone." App., *infra* at 31a. In addition, Weinberg, like any other peddler, had other options. The ordinance permits selling newspapers (Weinberg himself used to sell a newspaper at the United Center containing the same views as those in his book) and distributing leaflets that carry a message or advertise books or any other merchandise and identify locations at which such merchandise can be

purchased. Leafleting or other forms of no-cost distribution are a sufficient alternative channel of communication to justify a peddling ban, as the Ninth and District of Columbia Circuits have repeatedly held. See, *e.g.*, *Henderson*, 253 F.3d at 17; *Vietnam Veterans Memorial*, 116 F.3d at 497; *One World*, 76 F.3d at 1014.[7] An alternative method of distribution does not have to be equally lucrative before it will be deemed adequate. Nor, under settled law, is a speaker "expel[led]" from a restricted zone when he is permitted to disseminate his message in alternative formats. App., *infra* at 31a. If these varied alternatives are not sufficient, then no alternative will suffice, at least where a peddler aims at a particular audience. That is because any proper no-peddling zones will necessarily keep peddlers out of the areas where sports fans or other particular targeted audiences congregate. By granting those who aim at identifiable audiences the right to invalidate peddling bans in order to sell at will to particular audiences, the court of appeals' approach, in practical effect, abolishes the alternatives inquiry altogether, and, in turn, likely dooms all peddling restrictions.

4. For all of these reasons, review of the decision below is fully warranted. The court of appeals itself noted that Chicago has enacted similar peddling restrictions around other stadia. In fact, peddling restrictions have been imposed

---

[7] To support its holding on this point, the panel cited *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), and *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990). App., *infra* at 17a-18a. In *Gilleo*, however, the Court's holding was limited to the context of a municipal ban on residential signs. The Court explained: "Whereas the government's need to mediate among competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing." 512 U.S. at 58 (citations omitted). And in *Bay Area Peace Navy*, the plaintiffs were not permitted even to pass out pamphlets to their intended audience. See 914 F.2d 1229. Here, as we note above, Weinberg can pass out advertising leaflets or other written materials in the no-peddling zone.

in other parts of Chicago precisely because they are an effective means of alleviating traffic and congestion. And the cases that have been litigated in other circuits demonstrate that municipalities all over the country use this important tool. The decision below casts serious doubt on the constitutionality of all of these regulations, and rampant litigation, with the promise of section 1983 damages, can be expected in its wake.

And, under the decision below, when geographically targeted peddling restrictions are challenged, they will be impossible to defend. If the first peddler to challenge the ban behaves himself during the litigation, the ban will fall. Even when peddling creates a demonstrable problem, if a municipality cannot also prove that every walkway within a no-peddling zone is congested, the ban will similarly fall. And even when peddling creates a demonstrable problem and the no-peddling zone is perfectly drawn, if the plaintiff desires to sell his wares to a targeted audience within that zone, the ban again falls. The decision below deprives local governments of a valuable tool that has been endorsed by this Court and other circuits. Indeed, because the facts are undisputed and the court of appeals' decision is so clearly in the teeth of this Court's precedent, the Court may wish to consider summary reversal. Whether by plenary review or summary disposition, the judgment below should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
MYRIAM ZRECZNY
Senior Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

Attorneys for Petitioners

* - Counsel of Record

May 19, 2003

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 02-1372

MARK G. WEINBERG,
Plaintiff-Appellant,

v.

CITY OF CHICAGO,
Defendant-Appellee.

Argued Sept. 25, 2002
Decided Nov. 20, 2002

Before BAUER, ROVNER, and WILLIAMS, *Circuit Judges*.

BAUER, *Circuit Judge*.

Plaintiff-appellant Mark Weinberg brought a suit challenging the constitutionality of Chicago's peddling law after being threatened with arrest for violating the ordinance. Weinberg argued the law, which prohibits peddling on public sidewalks in certain areas of the city, is unconstitutional under the First Amendment of the United States Constitution. Both parties moved for summary judgment and the district court granted summary judgment in favor of the City of Chicago. Weinberg appeals, arguing the district court erred in granting summary judgment and that the peddling ordinance is unconstitutional. Finding that the ordinance is not a proper time, place, and manner restriction and is an impermissible prior restraint on free speech, we reverse the district court's decision.

BACKGROUND

Mark Weinberg wrote and published a book entitled *Career Misconduct: The Story of Bill Wirtz's Greed, Corruption, and the Betrayal of Blackhawk Fans*, which, as is evident from the title, takes a highly critical look at Chicago Blackhawks owner Bill Wirtz. Weinberg decided to sell the book in what he determined to be an atmosphere highly conducive to sales: the United Center, home of the Chicago Blackhawks professional hockey team.

Mr. Weinberg is no stranger to selling his wares outside the United Center and its forerunner, the Chicago Stadium. From 1991 through 1997 Weinberg published and sold a magazine which, similar to *Career Misconduct,* negatively portrayed Wirtz and his ownership tactics. During this time Weinberg sold his magazine without incident or interference from authorities.

Beginning in December 2000, Weinberg began selling his criticisms of Wirtz in book format, charging $13.00 per copy. For approximately two months, Weinberg sold the book on the public sidewalks outside the United Center undisturbed. But on the evening of February 14, 2001, Chicago police officers informed Weinberg that he must stop selling his book outside the United Center, explaining that he was in violation of the City's peddling ordinance.

The section at issue, 4-244-147 of Chicago's Municipal Code (the "peddling ordinance"), provides as follows:

> No person shall peddle merchandise of any type on any portion of the public way within 1,000 feet of the United Center. A person holding a valid peddlers' license may peddle merchandise while on private property within 1,000 feet of the United Center only from a cart, table or temporary stand on private property without obstructing the public way, and pursuant to prior written permission from the property owner to do so. The provisions of this

> section shall be in addition to any other limitation on or regulation of peddlers. Any person who violates any provision of this section shall be fined not less than $200.00 nor more than $500.00 for each offense, and each day such violation shall continue shall be deemed a separate offense.

In addition, as part of the City's peddling ordinance, a separate provision, § 10-8-520, provides as follows:

> No person, other than a licensed peddler, as by the provisions of Chapter 4-244 of this Code shall sell, offer or expose for sale, or solicit any person to purchase any article or service whatsoever, except newspapers, on any public way.

The Chicago City Council enacted the ordinance to alleviate traffic congestion and maintain pedestrian safety around the United Center. It also enacted similar restrictions around other large stadiums throughout Chicago.

Confronted with the threat of arrest, Weinberg ceased selling the book on the public sidewalks outside the United Center. Then Weinberg sought and obtained a temporary restraining order which permitted him to resume book sales outside the United Center and the parties agreed to have the case transferred to a magistrate judge. Both parties filed motions for summary judgment. The court denied Weinberg's motion but granted summary judgment on all counts for the City, finding that the ordinance did not violate the First Amendment. Weinberg appealed, claiming the ordinance violates his free speech rights. He bases his First Amendment attack on the Chicago ordinance on a myriad of theories, contending the law does not apply to book sellers, is not a reasonable time, place, and manner restriction, is void for vagueness, and violates the doctrine of prior restraint. Each of these is addressed in turn.

ANALYSIS

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. Amend. I. The Supreme Court recognized in *Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), that this provision also applies to state governments under the Fourteenth Amendment. That the appellant sells his book for profit does not change the First Amendment analysis. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). *See also Ayres v. City of Chicago,* 125 F.3d 1010, 1014 (7th Cir. 1997) ("there is no question that the T-shirts are a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away."). We review a summary judgment determination as well as any questions of constitutional law under the de novo standard of review.

Mr. Weinberg wishes to sell his book on the public sidewalks surrounding the United Center. Public sidewalks come under the designation of a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). "[P]ublic streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Id. See also Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). When regulating First Amendment activity in a public forum the government has a difficult burden to carry. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). We have noted that "[g]iven their greater importance to the free flow of ideas, public fora receive greater constitutional protection from

speech restrictions." *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1297 (7th Cir.1996). Through this lens we now consider each of Weinberg's claims.

I. *Interpreting § 4-244-147*

Weinberg first argues that the ordinance at issue is inapplicable to First Amendment activity such as selling a book. Inherent in this point of contention is Weinberg's claim that printed material such as books cannot be included under the ordinance's definition of "goods, wares [and] merchandise." We will construe the municipality's law under state law. *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507-08 (7th Cir.1998). Illinois law states that "[w]here clear and unambiguous, statutory language must be enforced as enacted, and a court may not depart from its plain language by reading into it exceptions [or] limitations." *People ex rel. Devine v. $30,700.00 United States Currency*, 199 Ill.2d 142, 262 Ill.Dec. 781, 766 N.E.2d 1084, 1089 (2002).

In making this argument, Weinberg fails to grasp that the plain language of the ordinance unambiguously states "no person shall peddle merchandise of any type on any portion of the public way within 1,000 feet of the United Center." Chicago Municipal Code § 4-244-147.[1] This language could not be more clear as to what is prohibited. While its constitutionality is another matter, it certainly covers appellant's conduct. These words evidence a clear intent by the Chicago City Council to prohibit the sale of anything other than newspapers outside the United Center. A book, like a

---

[1] Its newspaper exemption is equally clear and unambiguous: "No person . . . shall sell, offer or expose for sale, or solicit any person to purchase any article or service whatsoever, except newspapers, on any public way." Chicago Municipal Code § 10-8-520.

newspaper, comes under the designation of a "good."[2] Merchandise is generally considered as any tangible item held out for sale. There is little doubt that the City intended to include books under the guise of "goods, wares [and] merchandise." Weinberg asks this Court to depart from the ordinance and extend the newspaper exemption to cover books. Applying Illinois law, we cannot come to any conclusion other than that book selling is prohibited while newspaper selling is not. Given these considerations, we reject Weinberg's argument that the ordinance does not apply to someone selling a book.

Weinberg next claims that the ordinance's exemption for newspaper sellers renders the law unconstitutional. He argues that the ordinance gives "special status" to newspapers over books. In effect, the ordinance singles out the sale of newspapers as being permitted while completely banning the sale of books. That the law exempts newspapers from restrictions but not books does not automatically mean the restriction is content-based. *Leathers v. Medlock*, 499 U.S. 439, 453, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), explains that differential treatment such as this is unconstitutional only if it "is directed at, or presents the danger of suppressing, particular ideas." In the case at bar, the suppression of particular ideas is not the consequence of enforcing this ordinance. Allowing some forms of expression while denying others does not signify a violation of the First Amendment. In *United States v. Kokinda*, 497 U.S. 720, 734, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990), the Court noted that the activity of solicitation could be singled out and prohibited because of the disruption it caused. According to the Court, "[s]olicitation requires action by those who would respond" whereas leafleting does not require one to do anything other than "mechanically . . . take it out of someone's hand." *Id.*

---

[2] A good is defined as "portable personal property." The American Heritage Dictionary 567 (2nd ed.1991).

The City of Chicago has similar concerns regarding public safety and traffic congestion around the United Center. Selling goods or merchandise would create a greater disruption than selling a 50¢ newspaper. The City's restriction on selling goods, with the exception of newspapers, is based on its concerns about the disruption and the effects on traffic congestion, not on suppressing ideas captured in book form.

In *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), the Court considered the constitutionality of a Minnesota statute which permitted solicitation at a state fair, but restricted it to a fixed area. The Court held the limitation was a permissible restriction because it furthered the state interest of crowd control at the fair. Similarly, the different treatment of newspapers and books helps achieve the City's goal of limiting traffic congestion. A book purchase is usually more expensive, more time consuming, and more absorbing than a simple newspaper purchase. *See Graff v. City of Chicago*, 9 F.3d 1309, 1320 (7th Cir.1993). Differential treatment between various forms of expression is permissible if it is done within the strictures of the First Amendment. We will respect a government's recognition that different forms of First Amendment activities have varying degrees of effects on its interests, as long as the government is not attempting to suppress a certain message or viewpoint. For these reasons, the ordinance's newspaper exemption does not render it unconstitutional.

II. *Time, Place, and Manner*

Weinberg next contends, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), that the peddling law is not content-neutral, not narrowly tailored to serve a significant government interest, and does not leave open ample alternative channels. We now consider whether the ordinance constitutes a reasonable time, place, and manner restriction.

The City claims that the ordinance is a mere restriction on the place in which one can sell goods. The City, of course, has every right to maintain limitations on where and when such activities may occur. However, these limitations must be able to coexist with the First Amendment. The restrictions must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

The first determination of the time, place, and manner analysis is whether the law in question is content-neutral. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. Restrictions on speech are content-neutral if they are "justified without reference to the content of the regulated speech." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746.

Weinberg bases his contention that the ordinance is not content-neutral on the argument that the ordinance permits only "topical" speech while restricting all other types of speech. Weinberg points to the admission by the City that whether speech is considered "topical" is one of the criterion for determining whether something qualifies as a newspaper. Weinberg classifies his work as a "screed," which is quite different from the speech typically associated with a newspaper. As a self-described screed, *Career Misconduct* documents evidence of Wirtz's alleged actions and presents it in an in depth manner that is not compatible with a newspaper

format. Weinberg concludes that because his speech does not fall under the auspice of "topical" speech its prohibition is a content-based restriction.

Weinberg's argument on content neutrality fails for a number of reasons, the most notable of which is that the City did not adopt this regulation of speech "because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. Weinberg's topical speech distinction ignores the fundamental framework of the *Ward* test. The peddling law makes no reference to the content of speech. It simply maintains a general prohibition on the sale of merchandise. As the City notes, the ordinance is wholly indifferent to any specific message or viewpoint. These regulations do not single out a certain message for different treatment. *Schultz v. City of Cumberland*, 228 F.3d 831, 840 (7th Cir.2000). The peddling ordinance does not require one to consider the content of the speech, merely its format. Since the City treats those selling any type of book, regardless of its content, equally, we cannot agree that the ordinance is content-based.

In enacting this ordinance, the City proposed to limit congestion on the sidewalk. *See Potts v. City of Lafayette*, 121 F.3d 1106, 1111 (7th Cir.1997). The purpose of the legislation, enacted years before Weinberg wrote his book, was not to silence Mr. Weinberg's message. The content of his message was of no interest to the City simply because he can still disseminate his message, albeit in a different format. While this may raise questions of whether the ordinance is narrowly tailored or leaves open ample alternatives, it does not raise concerns about the content neutrality of the ordinance. In addition, the fact that the ordinance adversely affects Weinberg while not affecting a newspaper seller is of little persuasion because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but

not others." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. Since the relevant inquiries regarding content neutrality have been satisfied, we find that the peddling ordinance is content-neutral.

We now must consider whether the Chicago ordinance is narrowly tailored to achieve a significant governmental interest. There is no doubt the City has a legitimate interest in protecting its citizens and ensuring that its streets and sidewalks are safe for everyone. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-85, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). Its interest in maintaining the flow of pedestrian traffic is intertwined with the concern for public safety. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Jacobsen v. Petersen*, 728 F.Supp. 1415, 1420 (C.D.S.D.1990).

Weinberg never explicitly questions the legitimacy of the state interest, likely because of the manifest weight of case law against him. *See, e.g., Madsen v. Women's Health Center*, 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593, (1994) (finding the state "has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks . . ."); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (recognizing state interest in safety and convenience of citizens using public fora); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir.1997) ("There are unquestionable benefits from regulating peddling, First Amendment or otherwise, [including] the control of congestion."). Instead, he challenges the sufficiency of evidence the government introduced justifying the necessity of the ordinance. In the context of a First Amendment challenge under the narrowly tailored test, the

government has the burden of showing that there is evidence supporting its proffered justification. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir.1999).

The City contends that because there is heavy traffic around the United Center, safety concerns justify the ordinance. On its face, this contention is hard to dispute. However, First Amendment rights demand more than mere facial assertions. It is true that the government may rely upon its own "real-world experience" in enacting regulations, *United States v. Kokinda*, 497 U.S. 720, 735, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990), but the City cannot blindly invoke safety and congestion concerns without more.

Arguably, a government could cite safety concerns as its sole reason for banning all peddling on all sidewalks since a potential exists for crowding or congestion. The City presented testimony from police officers and security officials familiar with the United Center and its environs. These officials testified that the peddling of merchandise created congestion and that the enforcement of the ordinance essentially eliminated the traffic problems. This testimony conflicts with a videotape, shot at the request of the district court, of Weinberg selling his book outside the United Center. Both parties were present as the taping took place. The video shows no interference with any pedestrian traffic nor any congestion along the sidewalk. Moreover, the City fails to make a persuasive assessment of the tape or its worth. Despite this highly relevant and informative piece of evidence, the City wants to focus on the scant testimony of two arguably self-serving witnesses.

Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir.1986), *aff'd*, 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987), offers guidance on the question of what constitutes sufficient evidence to prove the government's interest. In *Watseka*, we struck down an ordinance restricting solicitation for, among other reasons, lack of evidence

supporting the city's substantial interest. Finding that the city failed to offer, other than testimony from the Mayor, any substantive evidence that the ordinance prevented fraud, we noted "[s]uch a conclusory assertion by an interested party, particularly when unsupported by any statistics or firsthand knowledge of any actual crimes, lends little if any support to [the city's] claim." *Id.* at 1556. This language is applicable to the situation before us.

The City of Chicago has provided no objective evidence that traffic flow on the sidewalk or street is disrupted when Mr. Weinberg sells his book. The City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed. The City also fails to explain why there were no disturbances or problems when Weinberg was selling his book during the period prior to enforcement of the ordinance or after the lower court granted the temporary restraining order. Using a speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights. As Mr. Weinberg notes, the only evidence the City offered was based on speculation as to what might happen if booksellers could sell their books and the cumulative effect this might have on pedestrian traffic. This is problematic; "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). In addition, there was no evidence that other booksellers were present around the United Center. As in *Genusa v. Peoria*, 619 F.2d 1203, 1213 (7th Cir.1980), nothing in the record supports the City's contention that Weinberg's activity caused serious congestion or disturbance. In fact, a thorough examination of the record, and the video in particular, reveals not only that there is little basis for the City's concerns, but also that the City's concerns are not justified at all.

In addition to the problems noted above, the ordinance contains other inconsistencies. The peddling ordinance bans peddling, but leaves open activities such as leafleting, newspaper sales, street performances, and charitable solicitations. The City's position is that these categories of First Amendment activity somehow do not interfere with traffic congestion and pedestrian safety but selling a book has the potential to create chaos. Weinberg argues that this haphazard approach of permitting other forms of speech cannot advance the City's interest in maintaining traffic congestion. We agree. The recent Supreme Court decision, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002), offers some insight into this problem. *Watchtower* concerned a First Amendment challenge to an ordinance requiring solicitors to obtain a permit prior to engaging in door-to-door advocacy. The Court recognized that the town had a substantial interest in the prevention of fraud and crime. However, the Court noted that it must consider "whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve." *Id.* at 2089. The Court determined that the ordinance did not advance the town's interest in combating fraud because criminals would be able to avoid the permit requirements described in the statute. In finding the ordinance violated the First Amendment, the Court based its determination on the fact that the ordinance is "not tailored to the Village's stated interests." *Id.* at 2090. Similarly, the City of Chicago's inconsistent approach does not comport with its interests of maintaining traffic congestion.

We do not find that the City has no substantial interest in maintaining safety around the United Center. We do, however, find that the City has not appropriately demonstrated that Weinberg or any other peddler creates the problems the City asserts they cause.

Having found that the City has failed to show the ordinance advances a significant governmental interest, further discussion of whether the ordinance is a reasonable time, place, and manner restriction is not mandatory. However, we believe the City's failure to meet the other elements of this test warrants our attention. Notwithstanding the City's inability to show that Weinberg, or any peddler for that matter, posed a threat to the safety and free flow of traffic surrounding the United Center, the peddling ordinance is not narrowly tailored. A regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. To satisfy the narrowly tailored test, an ordinance need not be the least restrictive method for achieving the government's goal. *Id.* at 797, 109 S.Ct. 2746. Nevertheless, while a regulation does not have to be a perfect fit for the government's needs, it cannot substantially burden more speech than necessary. *Ward*, 491 U.S. at 800, 109 S.Ct. 2746.

The lower court notes that the 1,000-foot ban encompasses a majority of the United Center's parking lot. It then finds that a restriction of this magnitude is justified because the ordinance bans peddling "in the area with the heaviest concentration of pedestrians and automobiles." *Weinberg v. City of Chicago*, 179 F.Supp.2d 869, 878 (2002). What the district court failed to consider, however, is the effect such a large restriction has on peddlers. The 1,000-foot restriction overcompensates for an alleged congestion problem on the sidewalks around the United Center. The concerns behind the enactment and enforcement of the ordinance were to alleviate sidewalk congestion and prevent pedestrian traffic from spilling into the streets. While laudable goals, we cannot see how this can justify a restriction which prevents a peddler from selling his wares in large parking lots, less congested walkways, or sidewalks in less proximity to the United Center.

It appears that the City takes what amounts to be an all-or-nothing approach with peddlers. It avoids finding any kind of middle ground, such as a ban of less distance, a ban on peddling on certain narrow walkways, or a ban on peddling on the sidewalks immediately surrounding the United Center. Restrictions such as these would be less encompassing and less intrusive on First Amendment rights. A 1,000-foot ban is too great of a restriction; it effectively eliminates any opportunity for Mr. Weinberg to sell his book to patrons of the United Center. Mr. Weinberg notes that a 1,000-foot restriction eliminates "any meaningful avenue of distribution" of goods because most parking lots at the United Center are within a 1,000-foot radius of the building. The City's one-size-fits-all approach to restricting peddling cannot be reconciled with our First Amendment rights. *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

Given these concerns, we conclude that the ordinance burdens substantially more speech than is necessary. Because the City bans peddling even in areas where congestion would not be a hazard, we cannot say the City applied a sufficiently narrow law necessary to promote its legitimate interest.

The last inquiry in determining whether the City's ordinance is a reasonable time, place, and manner restriction is whether the law leaves open ample alternative channels. An adequate alternative does not have to be the speaker's first choice. *Heffron*, 452 U.S. at 647, 101 S.Ct. 2559; *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir.2000). However, an alternative is not adequate if it "foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups." *Gresham*, 225 F.3d at 907. *See also Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir.1996) (holding that a total ban on sidewalk art does not leave open alternative means of communication because alternative display in galleries or museums would not reach the same audience).

In applying this test, we also consider the alternative channels of communication themselves. The mere existence of an alternative method of communication cannot be the end of the analysis. We must also give adequate consideration to whether the alternatives are ample. Whether an alternative is ample should be considered from the speaker's point of view. The City argues and the district court agreed that alternative channels of communication exist for Weinberg to disseminate his message. *Weinberg*, 179 F.Supp.2d at 879. The district court noted that Weinberg can sell his book via the Internet, through bookstores, or in other areas of the city.[3] The City also points out that Weinberg still has the ability to disseminate his negative opinions of Mr. Wirtz outside the United Center. However, the simple fact that Weinberg is permitted to communicate his message elsewhere does not end our analysis if the intended message is rendered useless or is seriously burdened. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56-57, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (alternatives to posting signs on residential property such as posting signs on commercial property are inadequate because residents may wish to reach neighbors); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir.1990) (seventy-five yard security zone prevented anti-war protestors' demonstration from reaching the intended audience, military leaders); *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339-40 (W.D.Va.1987) (school

---

[3] The City adds additional alternatives in its brief, which include breaking up the book by chapter and selling it in newspaper fashion or handing his book out at no cost. The City relies upon *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495, 497 (D.C. Cir.1997) and *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1014-15 (9th Cir.1996) as support for the alternative of giving the book away. However, as in *Ayres*, the magnitude of the no-peddling zone eliminates the possibility that Weinberg could sell his book in proximity to the prohibited area, making reliance on these cases suspect. *Ayres, supra*, 125 F.3d at 1016.

regulation prohibiting protest shanties on lawn of building where Board of Visitors meets is not rendered valid by permission to erect shanties in other places not visible to members of Board, who were the intended audience); *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F.Supp. 667, 674 (N.D.Ill.1976) (permitting a parade route through black neighborhood not a sufficient alternative to a route through white neighborhood when white people were the intended audience).

As the Supreme Court has stated, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Mr. Weinberg is attempting to disseminate a message critical of the owner of the Chicago Blackhawks, Bill Wirtz. He has chosen to express his message in a self-authored book, for which he charges $13.00 a copy. His intended audience is Chicago Blackhawks fans. The most opportune time and place to reach this audience is outside the United Center, before and after Blackhawks home games. In evaluating First Amendment cases, we cannot check common sense at the door. As Weinberg notes, Blackhawk fans are a fundamentally different market than the market for bookstore readers or Internet users. The United Center is a unique location for the sale of Weinberg's book, especially since the target market for his book is Blackhawk fans.

In *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir.1990), the Ninth Circuit held that "an alternative is not ample if the speaker is not permitted to reach the intended audience." Weinberg is unable to sell his book to Blackhawks fans entering the United Center. The ordinance prevents him from reaching his intended book purchasing audience. The alternatives require Herculean

efforts by Weinberg or his customers to complete the sale.[4] Thus, in light of Weinberg's customer base and his unique marketplace, we cannot say the alternatives are ample, precisely because his "ability to communicate effectively is threatened." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

We recognize that "an adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir.2000). However, the City's onerous and inconsistent approach to First Amendment activity coupled with the substantially detrimental effects on Mr. Weinberg's free speech rights suggest to this Court that the ordinance does not provide ample alternatives.

The City does not support its bare assertion that a peddler within 1,000 feet of the United Center causes congestion problems. The ordinance is also not narrowly tailored and does not provide for ample alternatives. For these reasons, we find the peddling ordinance is not a reasonable time, place, and manner restriction.

III. *Vagueness*

Weinberg also claims that the peddling ordinance is unconstitutionally vague. He contends the ordinance is vague because it fails to define "newspaper." According to Weinberg, this failure to offer a clear definition of the term "newspaper" vests city officials with excessive discretion as to what they consider protected speech.

A law which "vests virtually complete discretion in the hands of the police fails to provide the minimal guidelines required for due process." *Gresham*, 225 F.3d 899 at 907

---

[4] For example, the City suggests that Weinberg could distribute fliers advertising the sale of his book and include locations outside the 1000-foot radius of the United Center where the book may be purchased.

(internal quotes omitted). A law must have a "reasonable degree of clarity" such that anyone of ordinary intelligence can grasp its import. *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993).

Weinberg never advances the notion that *Career Misconduct* is something other than a book. It clearly is not a newspaper. The term "newspaper" is a common word which leaves little doubt as to what it encompasses. In terms of its format, a newspaper shares none of the attributes of a book. A book is bound together by a cover while a newspaper is not. A newspaper is also generally published at regular intervals, larger in size, produced from inexpensive materials, and sold at a lower price. A legislature does not have to define every word in its legislation in order for it to satisfy a void for vagueness challenge. *Gardner v. Brown*, 5 F.3d 1456, 1459 (Fed.Cir.1993), *aff'd*, 513 U.S. 115, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). The word "newspaper" has a readily ascertainable meaning which is simple and straightforward. *See Newsom v. Friedman*, 76 F.3d 813, 817 (7th Cir.1996). For these reasons, we believe someone of common intelligence can discern the meaning of the word newspaper and therefore reject Weinberg's void for vagueness claim.

IV. *Prior Restraint*

Finally, Weinberg argues that the licensing procedures under the peddling ordinance give the City unfettered discretion in violation of the law of prior restraint. Before we can consider the substantive issue, we must first resolve the

question of whether Weinberg has standing to challenge this provision of the law. The provisions of the ordinance relevant to the prior restraint challenge are as follows:

Section 10-8-520 provides:

> No person, other than a licensed peddler, as by the provisions of Chapter 4-244 of this Code shall sell, offer or expose for sale, or solicit any person to purchase any article or service whatsoever, except newspapers, on any public way.

Section 4-244-040 provides:

> Every individual who desires a license as a peddler shall make application therefor in conformity with the general requirements of this Code relating to application for licenses, and shall state the class of license sought. Such application shall also state in what commodity or article of merchandise such peddler desires or intends to deal.

Section 4-244-060 provides:

> The annual fee for peddlers' licenses shall be as set forth in Section 4-5-010.

The City contends that Weinberg has no standing to challenge the licensing scheme because he wishes to sell his book in an area where a license still would not permit him to sell his book. It argues that since the ordinance bans all peddling, without regard to licenses, Weinberg has suffered no injury because of the licensing requirement and that a decision invalidating this provision of the ordinance would not affect Weinberg. The City attempts to place hurdles in Weinberg's path where none exist. A challenge of this nature does not involve the conventional standing requirements. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed

by a properly drawn statute, and whether or not he applied for a license." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) quoting *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In addition, the licensing scheme is intertwined with the 1,000-foot peddling ban. In striking down the 1,000-foot restriction, Weinberg still must apply for a license to peddle and face what he believes to be a procedure which vests unbridled discretion in city officials. As the district court noted, Weinberg did not have to subject himself to the requirements prescribed in the ordinance since it vested unbridled discretion with the city official. *Weinberg*, 179 F.Supp.2d at 881, citing *Lakewood*, 486 U.S. at 755-56, 108 S.Ct. 2138. Weinberg has standing because he will "suffer the vagaries of discretion" implicit in the licensing procedure. *Stokes v. Madison*, 930 F.2d 1163, 1168 (7th Cir.1991). Having determined that Weinberg has standing to challenge this provision of the ordinance, we now will consider whether he has done so in a proper fashion.

Weinberg never made an attempt to apply for a permit. However, facial challenges are permitted where a licensing scheme vests discretion in the decision maker. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). We permit these challenges because such schemes enable officials to self-censor protected expression. *Lakewood*, 486 U.S. at 759, 108 S.Ct. 2138.

In *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), the Court set forth the test to determine when a First Amendment facial challenge may be made to a licensing scheme. First, the law must confer the government with "substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Lakewood*, 486 U.S. at 759, 108 S.Ct. 2138. The law must also

have a "close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.*

The district court correctly found the ordinance vests "unfettered discretion" in city officials to issue peddling licenses and that they are devoid of criteria to guide officials. One need only glance at the licensing requirement provision of the ordinance and realize that there is absolutely nothing to guide city officials in determining whether to grant a permit. The Supreme Court has noted that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

The noted absence of any criteria is in stark contrast to the ordinance we faced in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir.1993). In *Graff*, the commissioner of transportation had to consider six set criteria before deciding whether to grant permission to build a newsstand. *Id.* at 1317-18. We noted that the factors gave specific guidance to the commissioner and limited his discretion. The licensing ordinance before us offers officials no guidance or criteria in making the license determination. We therefore affirm the lower court's ruling that the ordinance fails to set any standards for the City to use and thus vests the City with an impermissible degree of discretion.

Having determined the first element of the *Lakewood* test, we now must consider whether the ordinance has a "close enough nexus to expression or to conduct commonly associated with expression." *Lakewood*, 486 U.S. at 759, 108 S.Ct. 2138. Weinberg maintains that the lower court erred when it did not find the ordinance had a close nexus to freedom of expression. "In determining whether expressive conduct is at issue . . . [we look] to whether the activity in

question is commonly associated with expression." *Lakewood*, 486 U.S. at 769, 108 S.Ct. 2138. We believe that the sale of a book is associated with expression. Weinberg took great pains to stress that his mission was not to profit from the book, but to disseminate his social protest of the Blackhawks owner, Bill Wirtz. *Career Misconduct* is the vehicle for that message. Mr. Weinberg does not peddle Blackhawks shirts, hockey merchandise, or even other books. He sells a single book with a single message exposing Mr. Wirtz's supposedly corrupt business and political dealings. The sale of a book is a form of expression. In *Lakewood*, the Supreme Court found that the circulation of newspapers constituted conduct commonly associated with expression. 486 U.S. at 760, 108 S.Ct. 2138. In *Graff*, a plurality of judges found that the maintenance of a newspaper stand qualifies as conduct commonly associated with expression. "A newsstand is an instrument for the dissemination of expressive materials, and as such it falls within that special category of activities whose regulation implicates First Amendment values." *Graff*, 9 F.3d at 1328 (Flaum, J., concurring). These cases suggest that the written word, or anything closely associated with it, constitutes expression. That Weinberg places his message in book format cannot alter the outcome. If circulating newspapers or building a newspaper stand is associated with expression, selling a self-authored book with a political message constitutes expression. *See also Stokes v. Madison*, 930 F.2d 1163, 1168-69 (7th Cir.1991). The sale of Weinberg's book is intertwined with his message. *See Graff*, 9 F.3d at 1337 (Cummings, J., dissenting) ("distribution is an inseparable part of expression."). Weinberg's speech is related to the book and to the sale of such a book. Prohibiting Weinberg from selling his book prevents the message of *Career Misconduct* from being disseminated.

The licensing ordinance targets First Amendment activities. Selling a book that has the purpose of expressing a message is an activity which can be restricted through the

licensing scheme. We cannot agree with the lower court's summation that the licensing ordinance presents "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Weinberg*, 179 F.Supp.2d at 884. The licensing ordinance vests complete control in city officials with no criteria or guidance. We cannot agree that such an ordinance is too blunt, but rather find it to be the sharpest censorship tool possible. We also cannot agree with the lower court's ruling that the ordinance impacts First Amendment expression "incidentally." Given the considerations of this case, we find that the licensing ordinance affects people like Mr. Weinberg in more than a mere incidental fashion. The peddling ordinances directly and substantially impact First Amendment activity. The licensing procedure gives the City the ability to ban messages or products simply because of its disfavored status. We believe the licensing provision of the ordinance implicates speech and therefore creates the risk of censoring speech based upon who is applying for a license, and also find the ordinance has a close enough nexus to expression to justify a facial challenge.

Having determined that Weinberg may facially challenge Chicago's licensing procedure, we turn now to the merits. A prior restraint exists when a law gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Prior restraints are not per se unconstitutional, however, prior restraints are highly disfavored and presumed invalid. *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). There are two forms of prior restraint. The first is a procedure that places "unbridled discretion in the hands of a government official" and might result in censorship. *FW/PBS*, 493 U.S. at 225, 110 S.Ct. 596. The second is a licensing procedure that fails to place

time limits within which a decision maker must issue the license. *Id.* at 226, 110 S.Ct. 596. We find the first form of prior restraint is applicable to the City's licensing scheme.

The City can deny a person's right to sell merchandise by denying a license to peddle, therefore, the licensing scheme is a prior restraint on expression. *See Ward*, 491 U.S. at 795 n. 5, 109 S.Ct. 2746. The licensing scheme enacted by Chicago places unbridled discretion in the hands of city officials which may result in censorship. *See FW/PBS*, 493 U.S. at 225-26, 110 S.Ct. 596. The City contends that the licensing procedure is a mere formality in which officials simply determine whether the applicant has conformed to applicable provisions in the ordinance. However, the lack of specificity in the procedure and the amount of discretion vested in the official lends itself to manipulation by the City. We cannot presume that officials will act in good faith and follow standards not explicitly contained in the ordinance. *Lakewood*, 486 U.S. at 770, 108 S.Ct. 2138. There is no language in this procedure which curtails the discretion of City officials in granting a license. The City, via § 4-244-040, has the discretion to deny peddling permits. The licensing provision does not sufficiently curtail the discretion of City officials in granting licenses to peddle and thus violates the law of prior restraint.

CONCLUSION

For the reasons discussed above we find the Chicago peddling ordinance unconstitutional because it is not a valid time, place, and manner restriction and because the licensing procedure violates the law of prior restraint. We reverse the decision of the district court and remand for the entry of an order not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 02-1372

MARK G. WEINBERG,
Plaintiff-Appellant,

v.

CITY OF CHICAGO,
Defendant-Appellee.

Feb. 19, 2003

ORDER

Before BAUER, ROVNER, WILLIAMS, *Circuit Judges*.

On December 4, 2002, defendant-appellee filed a petition for rehearing *en banc* and on December 19, 2002, plaintiff-appellant filed an answer, and on December 26, 2002, defendant-appellee filed a reply in support of the petition for rehearing. A vote of the panel and active members of the court was requested, and a majority of the judges voted to deny the petition for rehearing *en banc*.

Judge Easterbrook dissented in an opinion joined by Judges Coffey and Manion, which follows. Judge Ripple voted to grant rehearing *en banc* but did not join in the dissent.

The petition for rehearing *en banc* is therefore DENIED.

EASTERBROOK, *Circuit Judge*, with whom COFFEY and MANION, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*.

This case presents the question whether the first amendment (applied to the states by the fourteenth) requires state and local governments to make speech exceptions to laws regulating conduct—here, the sale of merchandise. The panel answered yes, see *Weinberg v. Chicago*, 310 F.3d 1029 (7th Cir.2002), without trying to reconcile its view with contrary decisions of the Supreme Court. Nor did the panel recognize that it was going into conflict with other circuits that have rejected materially identical arguments. Whether governments must make speech exceptions to neutral statutes is an important and recurring question, here and in other circuits, as people seek to put public spaces to private ends. See, e.g., *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002); *Graff v. Chicago*, 9 F.3d 1309 (7th Cir.1993) (*en banc*). Before dropping this into the Supreme Court's lap, we ought to take a second look at the issue.

An ordinance forbids all peddling on public property within 1,000 feet of United Center, where the Chicago Bulls and Chicago Blackhawks play their home games.[1] United Center is in a high-density residential area, and congestion becomes acute when crowds of 20,000 or more converge at game time. The district court found it undisputed that congestion used to be a serious problem, which the 1,000-foot

---

[1] "No person shall peddle merchandise of any type on any portion of the public way within 1,000 feet of the United Center. A person holding a valid peddler's license may peddle merchandise while on private property within 1,000 feet of the United Center only from a cart, table or temporary stand on private property without obstructing the public way, and pursuant to prior written permission from the property owner to do so. The provisions of this section shall be in addition to any other limitation on or regulation of peddlers. Any person who violates any provision of this section shall be fined not less than $200.00 nor more than $500.00 for each offense, and each day such violation shall continue shall be deemed a separate offense." Chicago Municipal Code § 4-244-147.

rule relieved.[2] Our panel did not say that there is a material dispute that must be resolved at trial but dismissed the City's evidence out of hand as "self-serving" (310 F.3d at 1038) and held the ordinance unconstitutional as a matter of law because it does not make an exception for books.

Why can't peddling-control ordinances cover sales of literature? Economic laws of general application are valid if supported by any rational basis, and the government receives the benefit of all plausible inferences. Legislative choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). This ordinance faces no problem under that standard, and the panel soundly rejected a contention that the law's exception for newspapers

---

[2] "Officer John Walls testified at his deposition that, prior to the enactment of the peddlers' ordinance, peddlers slowed up and even stopped traffic, even though all peddlers were required to be 'mobile.' 'For years I have been asking to have all the vendors removed to the other side of the street because you can't have vendors out there when you're trying to get 22,000 people or 24,000 people into a Bulls game, because everyone of them disrupts and causes problems' with regard to traffic congestion and pedestrian safety. Specifically referencing Plaintiff's activities, Officer Walls stated that Plaintiff frequently gathered crowds of six to eight people, and that '[w]hen you have a crowd of six people eight people standing at the mouth of the sidewalk, these people have to go outside that protected area in order to get around or—and even if they're just walking around four or five people in a sidewalk—I mean outside the sidewalk on the street, to me that's obstructing.' Officer Walls also testified that the peddlers' ordinance 'helped immensely' and greatly reduced the congestion around the United Center, stating that when 'we were able to move [the peddlers] away, it opened up traffic to where it was like a difference on night and day. We didn't even realize how much of a problem we had because it was there all the time. As we moved the vendors away, we were able to—we actually could use less officers in certain areas and put them into the main crosswalks and everything became more orderly.'" *Weinberg v. Chicago*, 179 F.Supp.2d 869, 876 (N.D.Ill.2002) (footnote and citations to the record omitted).

makes it improper to curtail other peddling. 310 F.3d at 1035-36. Chicago's rule is a good deal more sensible than the exception-ridden peddling-control ordinance held constitutional in *New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). Our panel nonetheless assumed that the rules about time, place, and manner restrictions on speech apply to anti-peddling laws as applied to writings, and that the government thus must show that it has regulated with the lightest possible touch. Yet the City's ordinance does not single out the spoken or written word. It covers peanuts, beer, ice cream, hockey pucks, noisemakers, team jerseys, bobblehead dolls of Michael Jordan, and anything else that vendors may want to sell near a stadium. It forbids selling a hagiography of Bobby Hull or an autographed team picture, just as it forbids selling a denunciation of Arthur Wirtz or a can of Coca Cola.

Whether laws regulating conduct must except expressive activities is an old question, with an established answer: no. Governments may collect sales taxes on all retail transactions, including written, recorded, and broadcast speech, see *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (holding that this is so even if some media are exempted); Borders must locate its bookstores and Blockbuster its video outlets in areas zoned for shops rather than homes; AOL Time Warner must pay federal income tax just like every other corporation, even though almost all of its gross receipts come from material protected by the first amendment. Ever since *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), it has been understood that conduct regulation neutral with respect to a speaker's viewpoint may be enforced according to its terms. That principle covers Chicago's ordinance, which does not heap extra regulation on speech or speakers (contrast *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987)) or allow any viewpoint-based exception (does not, for example, exempt paeans to the

Mayor). *O'Brien* has been understood to nix all sorts of constitutionally based requests to remove expressive activities from generally applicable statutes. See, e.g., *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (no leaflet-sale exception to regulation of all sales at a state fair); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (*CCNV*) (no expressive-sleeping exception to rules banning camping in a public park); *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (first amendment does not compel government to accommodate religiously motivated activities that violate neutral statutes regulating conduct); *Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (no expressive-dancing exception to prohibition of public nudity). True, none of these decisions involved books, but the first amendment does not distinguish between leaflets (one subject of *Heffron*) and books.

Other courts of appeals have used the *O'Brien* principle to hold that government need not allow the sale of expressive materials in public parks where selling souvenirs and other trinkets has been forbidden. See, e.g., *Henderson v. Kennedy*, 253 F.3d 12 (D.C.Cir.2001); *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495 (D.C.Cir.1997); *One World One Family Now v. Honolulu*, 76 F.3d 1009 (9th Cir.1996); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C.Cir.1995). Once again none of these involved books: *ISKCON* dealt with religious audio tapes, *Vietnam Veterans* with T-shirts bearing political messages, *One World* with T-shirts conveying cultural slogans, and *Henderson* with religiously oriented T-shirts. Once again this is immaterial. Audio tapes and expressive clothing receive the same protection as other speech. See *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (text-bearing jacket); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)

(arm band implying a point of view). The first amendment applies to the message, not the medium. See, e.g., *Ayres v. Chicago*, 125 F.3d 1010 (7th Cir.1997); *Chicago Acorn v. Metropolitan Pier & Exposition Authority*, 150 F.3d 695, 703 (7th Cir.1998) (a "T-shirt could be considered a leaflet in another medium"). A neutral ban on sales treats books, T-shirts, and cotton candy alike; a constitutionally based exception for books must hold for T-shirts too, placing us in conflict with other circuits.

Our panel did not mention *Henderson* or *ISKCON*, although both were relied on by the district court and featured prominently in the appellate briefs. It did attempt to distinguish *One World* and *Vietnam Veterans*, on the ground that "the magnitude of the no-peddling zone eliminates the possibility that Weinberg could sell his book in proximity to the prohibited area, making reliance on these cases suspect." 310 F.3d at 1041 n. 3. This assumes what is to be established—that a neutral no-sale ordinance should be treated as a time, place, and manner regulation of speech. It also is factually unsound. The prohibition in *Vietnam Veterans* covered the Mall in Washington, D.C., which contains considerably more space than the public ways within 1,000 feet of United Center; the prohibition in *One World* covered all "public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki." 76 F.3d at 1011. And Chicago's ordinance does not expel Weinberg from the 1,000 feet surrounding United Center. He may give away his book, buttonhole passers-by and ply them with broadsides, or deliver a harangue from a soapbox. He may sell the book from any private property in the zone. An owner could charge him for the privilege, but any book seller must cover the expense of distribution: bookstores need to buy or rent their premises, while authors and publishers need to pay middlemen (including printers and bookstores) for essential services. The word "free" in the phrase "free speech" means "free of governmental meddling," not "free of cost."

If the ordinance really should be treated as a time, place, and manner rule, the panel's treatment of precedent from other circuits is not the only problem. Our panel assumed that the burden of making an exception is measured by how much disruption the plaintiff would cause, and it held that the City must permit book sales because Weinberg personally would not stir up much ruckus. It harped on the fact that Weinberg's book is critical of the Blackhawks' owner—as if the constitutionality of the ordinance depends on the plaintiff's viewpoint. Not so; either the law constitutionally may be applied to all literature sales, or it may be applied to none, and the author's angle does not matter. (Weinberg does not contend that this law was enacted to make it hard for him to sell his book.) The panel remarked: "The City of Chicago has provided no objective evidence that traffic flow on the sidewalk or street is disrupted when *Mr. Weinberg* sells *his* book. . . . The City also fails to explain why there were no disturbances or problems when *Weinberg* was selling *his* book during the period prior to enforcement of the ordinance or after the lower court granted the temporary restraining order." 310 F.3d at 1039 (emphasis added). This is not the right question. *Heffron* and *CCNV* reject any argument that the burden of making exceptions must be measured against the plaintiff's conduct standing alone. See, e.g., 452 U.S. at 652, 101 S.Ct. 2559 ("[t]he justification for [a law] should not be measured by the disorder that would result from granting an exception solely to [the litigant]").

Given the panel's opinion, *anyone* may sell *any* expressive material (including T-shirts and "expressive souvenirs" such as team pennants) on public ways near United Center. Because commercial speech is protected by the first amendment, see *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), and *everything* offered for sale at a sports stadium includes some commercial speech, everything may be sold there as a result of the panel's opinion—including bags of pretzels bearing

horoscopes and hot dogs served in paper trays emblazoned with slogans such as "All-beef franks are good for you!" or "Go Bulls!". Commercial speech may be regulated to curtail secondary effects, see *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), but the panel has held that the secondary effects of peddling are not so bad (and, to repeat, the City has not tried to regulate *speech* at all, so this line of argument is unavailable to it). Thus the question on the table is the degree of congestion to be expected from the law's repeal; it is not limited to the hassles Weinberg will cause all by himself. Indeed, the precedential force of this opinion takes out similar laws that cover Soldier Field, Wrigley Field, Comiskey Park, and other sports venues—not only in Chicago but also throughout the circuit. Many of these, like United Center, are situated in residential neighborhoods where auto and pedestrian traffic come to a crawl on game days.

The panel gets no support from its observation that a videotape taken near United Center after this suit was filed "shows no interference with any pedestrian traffic nor any congestion along the sidewalk." 310 F.3d at 1038. This is another Weinberg-specific point: everyone else was obeying the law. As *Heffron* and *CCNV* hold, it just does not matter that Weinberg personally won't cause the sky to fall. What the tape principally demonstrates is that enforcement of the ordinance facilitates smooth traffic flow. Evidence that a statute works should not be confused with a demonstration that it serves no useful purpose. (A tape of the vicinity at game time preceding the ordinance's enactment could permit a before-and-after comparison, but none is in the record.)

One final observation. Part IV of the panel's opinion, 310 F.3d at 1043-46, holds that the criteria for issuing peddling licenses are unconstitutionally vague. The City has not sought reconsideration of this issue, which is relevant only if

the 1,000-foot rule fails. Doubtless the City plans to fix this problem legislatively or by regulation. Under the panel's analysis, however, the 1,000-foot rule is not reparable. The case thus presents an important and recurring issue, creates a conflict among the circuits, and depends on legal propositions that the Supreme Court does not approve. These considerations support rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 01 C 1139

MARK WEINBERG,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant.

Jan. 14, 2002

MEMORANDUM OPINION AND ORDER

KEYS, *United States Magistrate Judge*.

Currently before the Court is Plaintiff Mark Weinberg's Motion for Summary Judgment. Plaintiff charges that the City's prohibition on peddling within 1000 feet of the United Center (the "peddlers' ordinance") violates his rights under the First Amendment. Plaintiff also attacks the Chicago Municipal Code's licensing ordinance for peddlers ("peddlers' licensing ordinance") as an unconstitutional prior restraint on his First Amendment rights. For the reasons set forth below, the Plaintiff's Motion is Denied. The Court finds that Summary Judgment in favor of the City is warranted.

FACTUAL BACKGROUND

The relevant facts are few and largely uncontested. In December, 2000, Plaintiff began selling *Career Misconduct*, a book Plaintiff authored criticizing Chicago Blackhawks owner Bill Wirtz, on the sidewalks outside the United Center

prior to the start of Chicago Blackhawks home games. On February 14, 2001, Chicago police officers informed Plaintiff that he was not permitted to sell his book within 1,000 feet of the United Center. These officers were enforcing the peddlers' ordinance, found in Chapter 4 of the Chicago Municipal Code, which prohibits peddling on the public walkways in certain areas throughout Chicago, including within 1,000 feet of the United Center. These officers permitted newspaper vendors to continue their sales near and around the United Center, however, because § 10-8-520 of the Chicago Municipal Code specifically exempts newspapers from the scope of the peddlers' ordinance.

Plaintiff's attorney promptly contacted the City of Chicago's Corporation Counsel's office, insisting that the peddlers' ordinance did not apply to Plaintiff's First Amendment activity of selling his book. The City disagreed, and Plaintiff filed suit in federal court seeking a temporary restraining order and preliminary injunction to prevent the City from enforcing its peddlers' ordinance against him. On February 23, 2001, Judge Guzman entered a temporary restraining order against the City, and referred the matter to this Court. The parties subsequently consented to proceed before this Court.

On March 14, 2001, this Court entered an order documenting the parties' agreement that the City would permit Plaintiff to sell his book on the sidewalk surrounding the United Center, pending the resolution of this action.[1] Discovery is complete and the Court is currently presented with Plaintiff's Motion for Summary Judgment. Because Plaintiff's Motion for Summary Judgment presents a pure question of law, the Court is empowered to grant summary judgment

---

[1] On March 9, 2001, the City filed a Motion to Clarify Judge Guzman's February 23, 2001 Order.

to Defendant. *Inter'l Union of Operating Eng'rs, Local 150, AFL- CIO v. Village of Orland Park*, 139 F.Supp.2d 950, 957 (N.D.Ill.2001).

RELEVANT LAW

Chicago's Municipal Code prohibits peddling within 1000 feet of the United Center. Specifically, § 4-244-147 of the Municipal Code provides that:

> No person shall peddle merchandise of any type on any portion of the public way within 1,000 feet of the United Center. A person holding a valid peddlers' license may peddle merchandise while on private property within 1,000 feet of the United Center only from a cart, table or temporary stand on private property without obstructing the public way, and pursuant to prior written permission from the property owner to do so. The provisions of this section shall be in addition to any other limitation on or regulation of peddlers. Any person who violates any provision of this section shall be fined not less than $200.00 nor more than $500.00 for each offense, and each day such violation shall continue shall be deemed a separate offense.[2]

Section 10-8-520 of the Chicago Municipal Code requires peddlers to obtain a license and exempts newspapers from the peddlers' ordinance:

> No person, other than a licensed peddler, as by the provisions of Chapter 4-244 of this Code shall sell, offer or expose for sale, or solicit any person to purchase any article or service whatsoever, except newspapers, on any public way.

---

[2] Chicago has enacted similar 1000 foot restrictions on peddling around Wrigley Field (4-244-130), Comiskey Park (4-244-145) and the New Maxwell Street Market (4-244-146).

Section 4-244-040 sets forth the requirements for obtaining a peddlers' license:

> Every individual who desires a license as a peddler shall make application therefor in conformity with the general requirements of this Code relating to application for licenses, and shall state the class of license sought. Such application shall also state in what commodity or article of merchandise such peddler desires or intends to deal.

Finally, Section 4-244-060 provides that:

> The annual fee for peddlers' licenses shall be as set forth in Section 4-5-010.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of showing that the record contains no genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-movant to show, through specific facts in the record, that there is "a genuine issue for trial." *Id.* at 324, 106 S.Ct. 2548. The Court examines the record in a light most favorable to the non-movant, but conclusory allegations without evidentiary support will not suffice. *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir.1999).

DISCUSSION

In his Motion for Summary Judgment, Plaintiff raises five arguments. First, Plaintiff claims that the peddlers' ordinance does not apply to the sale of his book because books are not "merchandise" under the Municipal Code. Next, Plaintiff argues that the City's restriction on books directly conflicts with the First Amendment's public forum doctrine and

subverts First Amendment values.[3] Third, Plaintiff asserts that the peddlers' ordinance is not a reasonable time, place, and manner restriction. Fourth, Plaintiff claims that the peddlers' ordinance is void for vagueness and vests undue discretion in distinguishing between protected and unprotected speech. Finally, Plaintiff characterizes the peddlers' licensing ordinance as an unconstitutional prior restraint because it grants City officials unfettered discretion in awarding peddling licenses. The Court addresses each argument in turn.

I. The Ordinance Properly Applies to Plaintiff's Booksales.

Plaintiff invites the Court to resolve this dispute on the narrowest of grounds; Plaintiff asserts that the sale of his book does not fall within the Code's definition of merchandise, and, therefore, the peddlers' ordinance does not apply to him. Plaintiff claims that a constitutional interpretation of the ordinance requires the exclusion of books from the scope of the peddling ordinance because: 1) Chicago Police Order 92-1 protected the rights of speakers to engage in protected speech on public walkways until 1996, and interpreting the peddling ordinance to encompass sales of books would conflict with this Police Order; 2) the City may not "lump together" protected First Amendment activities and unprotected activities; 3) no court has ever distinguished between different types of printed materials for First

---

[3] The public forum doctrine requires courts to strictly scrutinize ordinances which restrict speech in public places that have traditionally been held out as places of public discourse, such as parks and streets. The public forum doctrine does not ban such restrictions, but merely requires that such ordinances are reasonable with respect to the time, place, and manner of the restriction.

Amendment purposes in a public forum; and 4) persuasive authority reasons that First Amendment activities should be exempted from peddling ordinances.

Clearly, the terms of the peddling ordinance encompass the sale of merchandise of any type, including books. *See generally, United States v. Hayward*, 6 F.3d 1241, 1245 (7th Cir.1993) ("when the language of a statute is clear and unambiguous . . . the court must give effect to the plain meaning of the statute.") The Court is not persuaded by Plaintiff's assertion that a superceded Chicago Police Order, which exempted the sale of certain First Amendment goods from enforcement of the peddlers' ordinance, alters the plain and unambiguous language of the peddlers' ordinance.[4] Moreover, Plaintiff provides no support for his position that the Chicago Police Department has the authority to offer binding interpretations of City ordinances.

The Court further finds that Plaintiff's attempts to circumvent the plain language of the ordinance miss the mark. First, there is no prohibition against an ordinance restricting constitutionally protected and non-protected activity equally, as Plaintiff suggests. *See Ayres v. City of Chicago*, 125 F.3d 1010, 1016 (7th Cir.1997) (noting that the City could ban both unprotected and First Amendment peddlers from selling goods in certain areas); *One World One Family Now v. City of Honolulu*, 76 F.3d 1009, 1012 (9th Cir.1997) (ban on sales of all goods on city sidewalks is content neutral, even though the ordinance banned the sale of items containing expressive messages.) "The First Amendment does not guarantee the right to communicate one's view at all times and places or in

---

[4] A 1996 amendment to the 1992 Chicago Police Order eliminated any protections for First Amendment activity on public walkways. *See* Chicago Police Order 92-1, Addendum 2.

any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

Cities may enact ordinances restricting speech, as long as the ordinances "are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant government interest, and [leave] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Recently, the United States Supreme Court upheld an ordinance prohibiting persons from knowingly attempting to protest, educate, or counsel another within eight feet of a health care facility. *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). The Court found that the ordinance satisfied the *Ward* content-neutral test because it did not regulate the content of the prohibited speech, it applied equally to all demonstrators without regard to their message, and it was not enacted "because of disagreement with the message." *Id.* at 719-20, 120 S.Ct. 2480.

Similarly, this Court rejects Plaintiff's claim that the Court must construe the peddling ordinance to exclude book sales (or other First Amendment activity) to achieve a constitutional interpretation of the peddling ordinance. The peddlers' ordinance does not restrict the content of speech, but merely limits when and where merchandise, including expressive materials, may be sold. In addition, Plaintiff has produced no evidence that the ordinance was enacted because of disagreement with a particular message. Plaintiff claims, however, that the City's distinction between newspapers and other First Amendment goods renders the ordinance content

based, and asserts that no court has ever made a distinction between different types of printed materials for First Amendment purposes.

The Court disagrees. In *Graff v. City of Chicago*, 9 F.3d 1309, 1320-21 (7th Cir.1993), the Seventh Circuit held that "the City can recognize that people impulsively or routinely purchase newspapers in seconds. The more time-consuming purchase of books or videotapes, in contrast, would cause congregation and impede the flow of others." Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, the Supreme Court recognized that a city may properly distinguish between newspapers and other printed material if the selected ban is justified, or furthers a legitimate government interest. 507 U.S. 410, 429-30, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (holding that Cincinnati failed to establish that its selective ban on newsstands selling commercial handbills furthered its legitimate interest). Accordingly, the Court finds that the City's distinction between newspapers and all other First Amendment items does not, in and or itself, render the peddlers' ordinance unconstitutional.

Finally, Plaintiff claims that New York caselaw and legislation, which exempt speech and/or books from peddling restrictions, favor a similar interpretation of Chicago's peddlers' ordinance. However, the Seventh Circuit has already commented on the propriety of the peddlers' ordinance's ban on certain First Amendment activities, as it applied to the central district of downtown Chicago: "What is questionable about the Peddlers' Ordinance is not the ordinance itself but rather the size of the district that the city council has designated as a no-peddling zone. . . . It is one thing to ban peddlers, including . . . 'First Amendment' peddlers, from Grant Park; it is another to ban the latter from the surrounding streets as well." *Ayres*, 125 F.3d at 1015-16 (noting that the "case would be in a different posture if the designation had been limited to Grant Park.") The *Ayres'* court indicated that,

while the peddlers' ordinance was not a reasonable restriction as it applied to the entire central downtown Chicago district, the City's decision to ban both protected and non-protected activities was entirely appropriate. The Seventh Circuit's analysis of Chicago's peddlers' ordinance—not New York caselaw and legislation—is the proper guide in this case.

The plain and unambiguous language of the peddlers' ordinance indicates that the ordinance restricts the sale of books in certain areas of the City. Plaintiff's argument that the peddlers' ordinance is unconstitutional because it bans the sale of both constitutionally protected and unprotected merchandise is without merit. The Court must now determine whether the peddlers' ordinance is a reasonable and content-neutral time, place, and manner restriction.

II. The Peddlers' Ordinance Is A Content-Neutral Time, Place, and Manner Restriction.

The Constitution does not require the government to permit persons to exercise their First Amendment rights "on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The Government may impose reasonable restrictions on the time, place and manner of First Amendment speech, "provided that the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (quoting *Clark*, 468 U.S. at 293, 104 S.Ct. 3065.)

In this case, Plaintiff contends that the peddlers' ordinance is not content neutral, is not narrowly tailored, leaves

inadequate alternative channels for communication, and is unconstitutionally vague. The Court addresses each argument in turn.

A. The Peddlers' Ordinance is Content Neutral

Clearly, an ordinance enacted because of the government's disagreement with a particular message is content based, and not content neutral. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 737 (1st Cir.1995). However, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. An ordinance is content neutral if it is enacted in response to secondary effects resulting from the protected expression, rather than the message contained therein. *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 47-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (ordinance regulating adult film theaters was content neutral because it was enacted to curb the secondary effects of such theaters on the surrounding community, and not the content of the films.). Courts frequently review the government's "justification" for enacting an ordinance or regulation in determining whether the regulation is content based or content neutral. *City of Cincinnati*, 507 U.S. at 429-430, 113 S.Ct. 1505.

Despite Plaintiff's insinuations that he and his book were the target of the peddlers' ordinance, the ordinance was enacted long before Plaintiff published his book[5] and was not

---

[5] The Court notes that the peddlers' ordinance was passed in October, 1995, and that Chicago Police Order 92-1 was amended in 1996, years before Plaintiff published *Career Misconduct*. In addition, Plaintiff has not produced evidence or advanced a serious argument that the City permitted the sales of other books or First Amendment merchandise—except newspapers—within 1000 feet of the United Center, or that the City's enforcement of the ordinance against him was based on the content of his book.

enacted in response to Plaintiff's speech. And there is no dispute that the peddlers' ordinance applies to all merchandise—except newspapers—equally, regardless of their content. Plaintiff contends, however, that the City's decision to exempt newspapers from the peddlers' ordinance renders the ordinance content based.

The City claims that it enacted the peddlers' ordinance in response to the traffic and pedestrian congestion and hazards exacerbated by peddlers around and near the United Center. The Seventh Circuit has recognized that the City has a significant governmental interest in promoting the organized, effective, and safe flow of traffic. *MacDonald v. City of Chicago*, 243 F.3d 1021, 1034 (7th Cir.2001); *Graff v. City of Chicago*, 9 F.3d 1309, 1316 (7th Cir.1993) (ensuring the flow of pedestrian street traffic constitutes a substantial government interest.)

In addition, the City has offered evidence supporting its claim that peddlers were, in fact, creating traffic and pedestrian flow problems around the United Center prior to the enforcement of the peddlers' ordinance. Officer John Walls[6] testified at his deposition that, prior to the enactment of the peddlers' ordinance, peddlers slowed up and even stopped traffic, even though all peddlers were required to be "mobile." Walls Dep. at pp. 31-32. "For years I have been asking to have all the vendors removed to the other side of the street because you can't have vendors out there when you're trying to get 22,000 people or 24,000 people into a Bulls game, because everyone of them disrupts and causes problems" with regard to traffic congestion and pedestrian safety. *Id.* at pp. 32-33. Specifically referencing Plaintiff's activities, Officer Walls stated that Plaintiff frequently gathered crowds of six to eight people, and that "[w]hen you have a crowd of

---

[6] Officer Walls is a 31-year veteran of the Chicago Police Department, who has patrolled the area around the United Center for over nine years.

six people eight people standing at the mouth of the sidewalk, these people have to go outside that protected area in order to get around or—and even if they're just walking around four or five people in a sidewalk—I mean outside the sidewalk on the street, to me that's obstructing." *Id.* at p. 44.

Officer Walls also testified that the peddlers' ordinance "helped immensely" and greatly reduced the congestion around the United Center, stating that when "we were able to move [the peddlers] away, it opened up traffic to where it was like a difference on night and day. We didn't even realize how much of a problem we had because it was there all the time. As we moved the vendors away, we were able to--we actually could use less officers in certain areas and put them into the main crosswalks and everything became more orderly." (Walls Dep. at p. 33.)

Next, the City's distinction between newspapers and other merchandise is justified and necessary to achieve its goals of reducing congestion and improving safety around the United Center. *See Graff*, 9 F.3d at 1320 (agreeing that "the more time-consuming purchase of books or videotapes . . . would cause congregation and impede the flow of others who would then have to walk around [purchasers])." A discussion of the Supreme Court's analysis in *City of Cincinnati* illustrates the point well.

In *City of Cincinnati*, the Supreme Court explained that a city may properly distinguish between newspapers and other printed material if the selected ban is justified, or furthers a legitimate government interest. 507 U.S. at 429-430, 113 S.Ct. 1505. In that case, Cincinnati claimed that its ordinance restricting newsstands that distributed commercial handbills was justified by its interest in promoting aesthetics and in reducing litter. However, there was no similar restriction on newsstands distributing newspapers, and the ordinance did virtually nothing to reduce the overall number of newsstands.

The Supreme Court rejected Cincinnati's claim that its distinction between newspapers and handbills was justified. The Supreme Court explained that "[t]he distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted." *Id.* at 428, 113 S.Ct. 1505. The requisite fit between Cincinnati's justification for enacting the ordinance and the scope of the ordinance was not established; although Cincinnati claimed that it enacted the ordinance to reduce newsstands and the litter and blight associated with them, the ordinance did not restrict the overall number of newsstands, but merely restricted the type of publications the existing newsstands were permitted to sell. *Id.* at 428, 113 S.Ct. 1505 (noting that the City had not established the required "fit between its goals and its chosen means.") Cincinnati presented no evidence demonstrating that a newsrack's inclusion of commercial handbills, as opposed to newspapers, was somehow related to the problems the ordinance sought to cure.

In the instant case, however, the City of Chicago has presented evidence that its selective ban on all merchandise other than newspapers does significantly reduce its problems with traffic and pedestrian flow. Officer Wall testified that, unlike newspaper sales, the sales of books and other merchandise around the United Center were time consuming and had caused people to congregate and block traffic and pedestrian flow. Walls' Dep. at p. 38. "A newspaper guy will offer a paper, they take it, and they move. With the book sales, people would stop. They would actually stop. Maybe two or three books would be out, and they're looking at the book, trying to make a determination if they want to buy the book and it wasn't just like a quick sale, take it and run, so people were stopping more." *Id.*

In response, Plaintiff asserts that he, personally, did not contribute to traffic or pedestrian congestion, and directs the Court's attention to a videotape from February 2001,

documenting Plaintiff's book sales outside of the United Center. However, "[i]n evaluating the validity of the. . . . Peddlers' Ordinance . . . [the Court looks] to the entire range of activities that would be freed from regulation if the plaintiff prevailed," not just the Plaintiff's activities. *Ayres*, 125 F.3d at 1015. Therefore, the fact that Plaintiff's booksales did little to disrupt pedestrian traffic and safety on one evening is of little relevance to the Court's present inquiry. The Court must focus on the aggregate impact of permitting all vendors to peddle their wares.

The Court finds that the City has demonstrated that the peddlers' ordinance was enacted to further a legitimate government interest;[7] its interest in ensuring pedestrian safety and reducing traffic congestion around the United Center. In addition, the City has demonstrated that its distinction between newspapers and other merchandise is justified; the less time-consuming newspaper purchases had a minimal impact on the City's legitimate interests. Therefore, the Court finds that the peddlers' ordinance is a content-neutral restriction on Plaintiff's First Amendment rights. The Court must now determine whether the peddlers' ordinance is narrowly tailored, and whether it leaves open ample alternative channels for communication.

---

[7] Although Plaintiff makes much of the fact that the City has not cited to any studies or reports supporting its justification for enacting the peddlers' ordinance, the Supreme Court has stated that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or present evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. The Seventh Circuit had already stated in *Graff* that the City is free to recognize that the sales of books and videos are more time consuming and cause more congestion than the sale of newspapers. 9 F.3d at 1320.

B. The Ordinance Is Narrowly Tailored

A regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. In a traditional public forum, such as streets and parks, these restrictions must not substantially curtail speech more than necessary. However, an ordinance furthering a significant governmental interest need not be the least restrictive method for achieving the government's goal to satisfy the narrowly-tailored test. *International Union of Operating Engineers, Local 150 v. Village of Orland Park*, 139 F.Supp.2d 950 (N.D.Ill.2001). The regulation is narrowly tailored if the government's interests "would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746.

The Court has already determined that the City has a substantial governmental interest in ensuring pedestrian safety and reducing traffic congestion. *See generally Heffron v. Intern'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649-50, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (the need to maintain orderly movement of the crowd in congested areas is a significant governmental interest). The Court further finds that the ordinance does not substantially curtail speech more than is necessary to achieve its goals.

The evidence demonstrates that most, but not all, of the United Center's major parking lots are located within 1000 feet of the United Center. It follows, therefore, that automobile and pedestrian traffic is most heavily concentrated within that area. As such, the City's ordinance directly targets its legitimate concerns; the ordinance bans peddling—an activity that disrupts pedestrian and traffic flow—in the area with the heaviest concentration of pedestrians and automobiles.

Nevertheless, Plaintiff contends that because the City's ordinance does not expressly prohibit street performers or

leafleting in the area, the ordinance is not narrowly tailored. However, there is no evidence that either street performers or persons leafletting were contributing to the problem the City sought to address—safety and congestion. The City's evidence indicates that officers charged with patrolling the area around the United Center found that vendors impeded traffic and compromised pedestrian safety, and Plaintiff has not introduced any evidence to the contrary.

Plaintiff also argues that the City might be able to achieve its goal by enacting regulations that permitted booksellers to hawk their goods, but authorized officers to disperse crowds or sanction improper bookselling behavior. While this might be an alternative to the peddlers' ordinance, it is not the Court's role to substitute its judgment regarding appropriate remedies for pedestrian and automotive traffic for that of the City Council. Notably, this is not a case where the Plaintiff has proffered or the City has rejected numerous alternative, and less-restrictive, remedies to the congestion and safety problems. The City has demonstrated that the ordinance is not "substantially broader than necessary to achieve the government's interest" and the Court will not invalidate it based upon Plaintiff's speculation "that the government's interest could be adequately served by some less-speech restrictive alternative." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746.

The Court finds that the peddlers' ordinance promotes a substantial government interest that would be achieved less effectively absent the regulation. Therefore, the City has satisfied the narrowly-tailored test.

C. The Ordinance Leaves Open Ample Alternative Channels for Communication

The final inquiry in evaluating whether the City's peddling ordinance is a reasonable time, place, and manner restriction is whether the ordinance leaves open alternative channels for

communication of the information. The peddlers' ordinance satisfies this standard if Plaintiff is able to disseminate his message, even if the remaining avenues for communication may not be as effective or ideal as the one that is restricted by the regulation. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (distributing leaflets was an adequate alternative to posting campaign signs).

Several alternative channels of communication exist to enable Plaintiff to disseminate his message. Plaintiff has already successfully availed himself to sales via the Internet, and he has had limited success selling his book in local bookstores. If he obtains a peddlers' license, he is free to sell his book on the public way in other areas of the City. And if he obtains both a peddlers' license and permission from a private property owner within 1000 feet of the United Center, he is free to sell his book on that property.

Notably, the peddlers' ordinance does not prohibit Plaintiff from disseminating his *message*, it merely limits the areas in which he can sell his book. While the ordinance restricts Plaintiff's ability to sell his book within 1000 feet of the United Center, Plaintiff is free to distribute leaflets outlining his position with regard to Mr. Wirtz, or even advertising his book and website, within that area. Plaintiff may also distribute his book free of charge within 1000 feet of the United Center.

Plaintiff's claim that the area immediately around the United Center represents the greatest concentration of the book's target audience does not compel a finding in his favor. "The fact that crowds are concentrated in a particular area does not, in and of itself, make that location a reasonable place for expressive activity, despite the fact that it may be desirable to the plaintiffs for that very reason." *Chicago ACORN, SEIU Local No. 880 v. Metropolitan Pier and Exposition Authority*, No. 96 C 4997, 1999 WL 413480, at

*11 (N.D. Ill. June 2, 1999). The First Amendment does not guarantee Plaintiff a specific type of access to the exact audience he wishes to address. The Court finds that the peddlers' ordinance does not foreclose alternative channels for communication.

D. The Ordinance is Not Unconstitutionally Vague

Plaintiff's final challenge to the peddlers' ordinance is that the term "newspaper" is unconstitutionally vague. The Court disagrees. An ordinance is unconstitutionally vague if 1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited; and 2) it permits or promotes arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480 (2000).

Plaintiff contends that publications such as Newsweek, which can not be neatly labeled a book or a newspaper, highlight the vagueness of the ordinance. However, "it is clear what the ordinance as a whole prohibits . . . [and] speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Id.* at 733, 120 S.Ct. 2480 (quoting *United States v. Raines*, 362 U.S. 17, 23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)).

The Court finds that a person of ordinary intelligence understands the term "newspaper" [8] and that the exclusion of newspapers from the ban on peddling merchandise affords such persons a reasonable opportunity to understand what conduct is prohibited. In addition, the exclusion of

---

[8] Plaintiff also argues that, because the City's witnesses have never offered a consistent definition of the term newspaper, the term must be vague. However, the definitions offered by the City's witnesses, while not identical, are not inconsistent with each other.

newspapers from the ban on peddling merchandise does not encourage or authorize arbitrary or discriminatory enforcement. The exemption of newspapers from the peddlers' ordinance does not render the ordinance unconstitutionally vague.

The Plaintiff's Motion for Summary Judgment on the issue of the constitutionality of the peddlers' ordinance is denied. Summary Judgment is instead granted in favor of Defendant.

III. The Licensing Procedures Under Chapter Four of the City's Municipal Code Do Not Violate the First Amendment.

Plaintiff next challenges the City's peddlers' licensing ordinance as an unconstitutional prior restraint, claiming that the ordinance vests the City with unfettered discretion to decide whether to grant or deny peddlers a permit to sell their merchandise in the City of Chicago, in violation of the First Amendment. At the outset, the Court notes that neither party has presented the Court with substantial argument or research on this issue. Inexplicably, neither party found it necessary to address whether there is a sufficient nexus between the licensing scheme and protected expression, challenge or assert standing, explain whether the ordinance permits the licensing official to review the content of items to be peddled, present evidence on the actual implementation of the ordinance, or discuss the issue of redressability. While some of these matters are readily disposed of, such as redressability,[9] others present complex legal and factual issues,

---

[9] *See MacDonald v. City of Chicago*, No. 97 C 5266, 1998 WL 748350, at *3 (N.D.Ill. Oct. 21, 1998) (even though the court's ruling upholding certain subsections of a challenged ordinance meant that plaintiff's remaining challenge to another subsection could no longer redress his injuries, plaintiff had standing to challenge the remaining subsection because "plaintiff's standing was determined at the time he filed his lawsuit.")

which the Court must address without the benefit of the parties' briefing.

Plaintiff admits that he neither applied for nor was denied a permit to peddle, but claims that a facial challenge to the peddlers' ordinance is warranted because the ordinance unconstitutionally vests in City officials unfettered discretion to grant or deny peddling permits. *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad.") A person need not subject himself to the requirements of an ordinance if the ordinance, on its face, vests unbridled discretion in a government official over whether to permit or deny expressive activity. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). "The success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

Courts permit plaintiffs to challenge licensing schemes granting officials unfettered discretion, not because discretion, in and of itself, is unconstitutional, but because such schemes frequently carry the risk of self-censorship and confer upon corrupt public officials the ability to conceal their illegitimate abuse of power by censoring protected expression. *City of Lakewood*, 486 U.S. at 759, 108 S.Ct. 2138; *see also Forsyth County*, 505 U.S. at 131, 112 S.Ct. 2395 (holding ordinance unconstitutional where it permitted

county official to examine the content of the applicant's message and to correspondingly vary fees for assemblies to reflect the cost of maintaining public order with respect to the particular message). It necessarily follows, therefore, that not every licensing scheme that vests a decisionmaker with unbridled discretion is subject to a facial attack. *City of Lakewood*, 486 U.S. at 759, 108 S.Ct. 2138. Rather, the licensing scheme must also have a "close enough nexus to expression or expressive conduct to give rise to a substantial threat of undetectable censorship." *Id.*

Therefore, the Court must determine both whether the peddlers' licensing ordinance vests City officials with unfettered discretion and whether the ordinance has a close nexus to expression.

A. The Ordinance Vests the Licensing Official With Unfettered Discretion.

Plaintiff convincingly argues that the Chicago peddlers' licensing ordinance vests City officials with unfettered discretion to grant or deny peddling licenses. The ordinance is devoid of any criteria to guide licensing officials in reviewing license applications, providing only that:

> Every individual who desires a license as a peddler shall make application therefor in conformity with the general requirements of this Code relating to applications for licenses, and shall state the class of license sought. Such application shall also state in what commodity or article of merchandise such peddler desires or intends to deal.

Chicago Municipal Code § 4-244-040.

The ordinance at issue is readily distinguishable from the Chicago Park District permit ordinance reviewed by the Seventh Circuit in *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir.2000), *cert. granted*, 532 U.S. 1051, 121 S.Ct. 2191, 149 L.Ed.2d 1023 (U.S. May 29, 2001) and the City of

Chicago parade permit ordinance challenged in *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir.2001). In both *Thomas* and *MacDonald*, the plaintiffs claimed that the criteria set forth in the challenged ordinances were so vague as to vest the respective officials with limitless discretion in issuing permits.

The Seventh Circuit disagreed, finding instead that, in both instances, the challenged ordinances contained sufficient limitations on the respective officials' discretion. *Thomas*, 227 F.3d at 924 (noting that "[a] challenge to the wording as distinct from the application of a regulation invites semantic nitpicking"); *MacDonald*, 243 F.3d at 1027 (ruling that the challenged ordinance specified "legitimate safety concerns in as precise a manner as such concerns can reasonably be articulated.")[10]

In the instant case, however, Plaintiff does not take issue with the vagueness of certain guiding criteria. This was not an oversight; such an argument would be impossible in this case because there are simply no criteria to challenge as vague. In contrast to the allegedly obscure standards contained in the *Thomas* and *MacDonald* ordinances, there are no standards whatsoever to guide the City's licensing official in determining whether or not to grant a peddling permit. The peddlers' licensing ordinance vests total discretion in the

---

[10] In *MacDonald*, the Seventh Circuit further explained that prior restraint analysis applies to licensing schemes vesting officials with unfettered discretion. 243 F.3d at 1030. Conversely, ordinances that do not place unfettered discretion in the hands of city officials and do not involve censorship should be analyzed according to the time, place, and manner guidelines. *Id.* at 1030-31. In addition, the court relied heavily upon the fact that the parade permit ordinance did not prohibit anyone from marching—because it required the Commissioner to issue an alternative permit—but merely restricted the time and place of the parade. *Id.* at 1032. Conversely, the peddlers' licensing ordinance does authorize unfettered discretion and can prohibit legal peddling within Chicago.

City's licensing official to grant or deny a license to peddle, even when a peddler is engaging in speech activities on the public way.

The City responds with two underdeveloped arguments. The first is that the City's licensing official does not have any discretion to deny an application for a peddler's license. The City's position is untenable. The Court will not read limitations into the ordinance that do not appear in the text of the ordinance itself. *City of Lakewood* ("The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation binding judicial or administrative construction, or well- established practice.")

To the extent the City is actually arguing that, in practice, the City never denies a peddlers' license application, or that it has developed guidelines limiting the licensing official's discretion, it has failed to make its case. Although the Supreme Court has permitted governments to rebuff facial challenges to ordinances by presenting evidence that the government has developed a uniformly applied practice in administering the ordinance, which constitutionally limits the application of that ordinance, *City of Lakewood*, 486 U.S. at 770 n. 11, 108 S.Ct. 2138, the City has failed to produce any such evidence in this case. The Court finds that the City's bald assertion that the licensing official does not have unfettered discretion, contained in a single line in its response brief, is not sufficient evidence at this stage of the proceedings.

Next, the City briefly states that the ordinance does not permit the licensing official to censor First Amendment speech, because the ordinance only requires the peddler to identify the "commodity or article of merchandise" he wishes to sell. The Court can envision instances where merely identifying the commodity or article of merchandise to be sold would sufficiently alert the licensing official to the content of the applicant's speech or expression so as to permit

censorship; this case may be just such an instance. The record reveals that City officials were keenly aware of—and concerned about—Mr. Weinberg's book and booksales prior to the filing of this lawsuit. It is not too speculative to suppose that a licensing official presented with Mr. Weinberg's application to sell *Career Misconduct* would be sufficiently apprized of the content of Mr. Weinberg's book to permit the opportunity for censorship.

The Court, therefore, finds that Plaintiff has established that the ordinance vests the City with an impermissible degree of discretion to regulate peddling, and fails to set forth any standards by which the City is supposed to exercise this power.

B. The Ordinance Does Not Have A Close Nexus to Expression.

This is not the end of the Court's inquiry, however, as Plaintiff must also establish that the ordinance has a "close enough nexus to expression or expressive conduct." This presents the closer question, and requires an examination of the Supreme Court's decision in *City of Lakewood.*

In *City of Lakewood*, the Supreme Court struck down a licensing ordinance governing the placement of newsracks in the city. The ordinance offered minimal restrictions on the licensing official's discretion. Nevertheless, the Court explained that a licensing scheme must do more than merely vest unbridled discretion in city officials before a plaintiff can proceed on a facial challenge. In addition, "[t]he law must have a close enough nexus to expression to pose a real and substantial threat of the identified censorship risks." 486 U.S. at 759, 108 S.Ct. 2138.

The Court found that Lakewood's ordinance had a close enough nexus to expression, and the attendant risk of censorship, for two reasons. First, the requirement that the licenses be renewed annually fostered self-censorship.

Second, the ordinance was "directed narrowly and specifically at expression"—the circulation of newspapers. Given these characteristics, the Court found that there was more than a mere possibility that censorship could occur. The Court found that a facial challenge was available because the plaintiff had demonstrated that the licensing scheme afforded licensing officials "substantial power to discriminate" and that there existed a "real and substantial threat" of censorship. 486 U.S. at 759-60, 108 S.Ct. 2138.

The Court further illustrated the parameters of the "nexus to expression" requirement by distinguishing Lakewood's newsrack ordinance from a hypothetical ordinance requiring soda vendors to obtain a license. The Court explained why a facial challenge to an ordinance granting city officials unfettered discretion to issue soda vending licenses should not be permitted:

> Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to the soda; therefore preventing it from installing its machines may penalize unrelated speech, but will not directly prevent that speech from occurring. In sum, a law giving the mayor unbridled discretion to decide which soda vendors may place their machines on public property does not vest him with frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech by suppressing the speech or directly controlling the vendor's ability to speak.

Lakewood, 486 U.S at 760, 108 S.Ct. 2138. The Court noted that "[l]aws of general application that are not aimed at conduct commonly associated with expression" rarely carry the attendant censorship risks that justify a facial challenge. *Id.* at 760-61, 108 S.Ct. 2138. Although such laws could be used as instruments of censorship, the inherent risk of such a

nefarious abuse does not warrant departing from the requirement that the plaintiff suffer an actual injury. The availability of an as applied challenged is a sufficient remedy for such abuses. *Id.*

Admittedly, unlike the soda vendor, a peddler's speech may very well be related to the item he is peddling. Therefore, at least with regard to some peddling applicants, a City official will be presented with the opportunity to exercise power over the peddler's speech. Nevertheless, the Court finds that the City's peddlers' licensing ordinance presents "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761, 108 S.Ct. 2138. While some peddlers will seek to sell items related to speech, such as Plaintiff, many others will not.

Although the peddlers' licensing ordinance can impact First Amendment expression, it does so only incidentally. *Schneider v. New Jersey*, 308 U.S. 147, 160-61, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (state may prohibit speaker from "taking his stand in the middle of a crowded street, contrary to traffic regulations . . . since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.") The peddlers' licensing ordinance primarily seeks to regulate commercial activity, not speech or expression. *See Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61, 69-70 (3d Cir.1990) (general regulation of "commercial activity" did not meet nexus requirement.); *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir.1996) (insufficient nexus where ordinance banned sitting or lying on sidewalks). "Like laws requiring individuals to obtain building permits for certain purposes . . . a regulation requiring governmental consent for commercial activity will seldom serve as an effective means of censorship." *Gannett*, 894 F.2d at 69.

There are, of course, instances where regulation of commercial activity will provide significant opportunities for censorship. In *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir.1991), the Ninth Circuit permitted nonprofit corporations to facially challenge an ordinance prohibiting them from selling their message-bearing merchandise in the Fisherman's Wharf or Union Square areas of San Francisco. *Id.* at 1062- 63. In that case, however, the court examined only that subsection of the ordinance that required nonprofits to obtain a permit before engaging in sales solicitations for charitable purposes; that ordinance did not apply to other types of merchandise. *Id.* at 1061-62. Therefore, the court readily found that the ordinance had a close nexus to expression. *Id.* at 1062-63. The Chicago peddlers' licensing ordinance contains no similar limitation; it applies equally to persons peddling books and those peddling peanuts.

More analogous is one of the ordinances *reviewed in International Union of Operating Engineers, Local 150, AFL-CIO v. Village of Orland Park*, 139 F.Supp.2d 950, 962 (N.D.Ill.2001). In *Local 150*, the court found that a forest preserve's special activity permit requirement did not have a close enough nexus to expression to pose a substantial risk of censorship, because the ordinance regulated activities that were not protected (such as sporting events) as well as protected activities. *Id.* The court held that "[b]ecause not every application of the Forest Preserve's permit procedure infringes on protected constitutional rights," a facial challenge was inappropriate. *Id.*

Similarly, the Court finds that the peddlers' licensing ordinance is not "narrowly and specifically" directed at expression. Although the ordinance may implicate speech occasionally, it does not necessarily do so. The ordinance is also directed at those selling peanuts and baseball hats, which are not—or perhaps only remotely—expressive activities.

Because the ordinance does not carry a substantial risk of censorship with regard to the entirety of peddlers' license applications, the ordinance does not have a close enough nexus to expression to justify a facial challenge. Therefore, Plaintiff's Motion for Summary Judgment is Denied.

CONCLUSION

For the reasons set forth above, the Court finds that the City's peddlers' ordinance is a reasonable time, place, and manner restriction. Therefore, the Court denies the Plaintiff's Motion for Summary Judgment on this issue and grants Summary Judgment to the City. Similarly, the Court rejects Plaintiff's facial challenge to the City's peddlers' licensing ordinance, because the ordinance—although it vests the City with an impermissible degree of discretion to regulate peddling without setting forth standards for the exercise thereof—does not have a close enough nexus to expression to justify a facial challenge. Therefore, Plaintiff's Motion for Summary Judgment is Denied.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment be, and the same hereby is, DENIED. IT IS FURTHER ORDERED that Summary Judgment for the Defendant be, and the same hereby is, GRANTED.